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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 358

BUCKHEAD THEATRE CORPORATION, et al.,
Petitioners,

versus

ATLANTA ENTERPRISES, INC., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, BUCKHEAD THEATRE CORPORATION AND GARDEN HILLS THEATRE CORPORATION, PETITIONERS, PRAY THAT A WRIT OF CERTIORARI ISSUE TO REVIEW FINAL JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ENTERED IN THE ABOVE-ENTITLED CASE JANUARY 21, 1964.

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SUBJECT INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
The Parties and Theatres	4
First-Run Product Play-Off in Atlanta	6
Uniform Thirty-Day Clearance in Atlanta	7
Efforts of Petitioners to Obtain First-Run or Reduced Clearance	7
Uniform Denial by Distributors of First-Run or Reduction in Clearance	9
Knowledge of Distributors	11
Film Rental Discriminations	12
Opinion Evidence of Damage	12
ARGUMENT	
Impact of Condemned Paramount Case Acts and Practices in Atlanta from 1938 Through 1961, Inclusive	13
A. Impact of Condemned Paramount Case Acts and Practices in Atlanta 1938 Through 1945	14
B. Impact of Condemned Paramount Case Acts and Practices in Atlanta 1946 Through 1961	17
THE PARAMOUNT DECREES WERE ADMISSIBLE IN THESE ACTIONS	21

INDEX (Continued)

Page

Although Some Condemned Paramount Practices were Abandoned After 1945, The Pre-1945 Paramount Conspiracy Continued During Petitioners' Damage Period 21

It Was Not Necessary for Petitioners to Establish a Nationwide Conspiracy with Evidence Independent of the Paramount Decrees in Order for Decrees to be Admissible in Evidence. 26

Paramount Decrees were Admissible as Prima Facie Evidence of a National Conspiracy up to 1945 28

Paramount Decrees Were Not Inadmissible Because Petitioners' Damage Period Commenced After 1945 29

Paramount Decrees Together with Evidence Before Jury Warranted Submission of Count One to Jury 31

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT 35

APPENDIX A 39

APPENDIX B 41

APPENDIX C 54

TABLE OF CASES CITED

	Page
Basle Theatres, Inc. v. Warner Bros. Pictures Distr. Corp'n (W.D. Pa.) 168 F. Supp. 553, 559	31
Don George, Inc. v. Paramount Pictures, Inc. (La.) 111, F. Supp. 458	28
Emich Motors Corp. v. General Motors Corp. 340, U.S. 558, 95 L. ed. 534, 71 S. Ct. 408	27
Homewood Theatre v. Loew's Inc. (Minn.) 110, F. Supp. 398	27
Loew's, Inc. v. Cinema Amusements, Inc. (C.A. 10) 210 F. 2d. 86	28
New Amusements v. Knoxtenn Theatres, Inc., (E.D. Tenn. N.D.)	31
Park Neponset v. Smith (C.A. 1) 259 F. 2d. 452, 455-6	29
Rubenstein, Inc. v. Columbia Pictures Corp'n (Minn. 4 Div.) 176 Supp. 527, 536 (1959)	27
Theatre Enterprises v. Paramount Film Distributing Corp., 346 U.S. 537, aff'g (C.A. 4) 201 F. 2d 306	27
Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp. (C.A. 8) 194 F. 2d. 846, cert. den. 1952	27
Tivoli Realty, Inc. v. Paramount Pictures, Inc. (C.A. 4) 201 F. 2d. 306	27
United States v. Schine, 334, U.S. 117, 130	31
Webster Rosewood Corp'n v. Schine Chain Theatres, Inc. (N.D. N.Y.) 157 F. Supp. 251, 255; aff'd (C.A. 2) 263 F. 2d. 533	31

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 327 F.2d 365. (SEE APPENDIX B)

JURISDICTION

The Judgment of the U. S. Court of Appeals for the Fifth Circuit was entered on January 21, 1964 (See Appendix B). A petition for rehearing was denied April 30, 1964. This Court granted Petitioners' motion to extend time for filing this Petition for Writ of Certiorari to August 8, 1964. The Jurisdiction of this Court is invoked under 28 U.S.D. Section 1254 (1).

The Jurisdiction of the District Court was invoked because a question arises under the Sherman and Clayton Acts. (15 U.S.C.)

QUESTION PRESENTED

This petition presents the question whether the Court of Appeals and District Court erred in holding inadmissible the decrees, findings of fact and conclusions of law in *U. S. v. Paramount Pictures, Inc.* as to Count 1 of each petitioner's complaint. A subsidiary question is raised whether such exclusion, if error, requires a reversal and a new trial as to Count 1 of the complaint. This subsidiary question was not decided by either Court below, since both Courts ruled the Paramount decrees inadmissible.

Each action was brought under the anti-trust laws of the United States against various distributors of motion picture films (all of whom had been defendants in the Paramount case) and against corporations connected with operating theaters in the city of Atlanta and elsewhere. The opinion of the Court of Appeals summarizes the complaints and answers as follows:

> "The complaints below were substantially identical and will be dealt with in this opinion as if they were one suit. Each complaint was in three counts. Count one alleged a national conspiracy on the part of the named distributors of motion picture films and certain local corporations of the Atlanta distributing area connected with operating theatres in that area, charging various acts that were alleged to restrain and monopolize interstate trade and commerce in motion picture films. Count two alleged substantially the same conspiracy except that it was alleged to be a con-

spiracy different from and separate from the national conspiracy and alleged to exist only within the Atlanta area. Count three was directed only at the defendant exhibitors, thus containing no claim against the motion picture distributors. Both complaints were filed in January, 1956. The periods for which damages were recoverable, as alleged in the complaint, commenced January 5, 1952, and ended June 30, 1961.

"The defendants denied all the allegations of conspiracy, and, of course, denied being liable in any damages to the plaintiff."

Buckhead Theatre Co., et al. v. Atlanta Enterprises, Inc. et al., 327 F 2d 365, 366.

STATEMENT OF THE CASE

Each of these two actions was brought under the antitrust laws of the United States. 15 U. S. C., and they were consolidated for trial in the District Court for the Northern District of Georgia. At the conclusion of the case of each petitioner, all defendants made motions for directed verdict as to each of the three counts in each petitioner's complaint. The District Court, Sloan, D. J., granted the motion of the defendants as to Count 1 of the complaint of each petitioner, and denied the motion as to Counts 2 and 3, which were submitted to the jury on questions (R. 1239, 1241). The jury found for the defendants on Counts 2 and 3 of each case. Judgment was entered by the Court for the defendants in each action. (R. 1186) Each petitioner made timely appeal to the

United States Court of Appeals for the Fifth Circuit. That Court affirmed the judgment of the District Court by opinion of January 21, 1964, supra, denied a petition for rehearing on April 30, 1964.

The Parties and Theatres

In *Buckhead Theatre Company v. Atlanta Enterprises, Inc., et al.* Civil Action No. 5478, the plaintiff Buckhead Theatre Company had been since about 1935 the operator of the Buckhead Theatre, a motion picture theatre in the Buckhead section of the City of Atlanta, Georgia. It had a seating capacity of 923 seats (R.134) and was located about 7 miles from the downtown theatres in Atlanta (R. 240).

In *Garden Hills Theatre Company v. Atlanta Enterprises, Inc.*, et al Civil Action 5479, the plaintiff Garden Hills Theatre Company had since 1940 been the operator of the Garden Hills Theatre (the name being changed in late 1958 to the Fine Arts Cinema Theatre) about 8 blocks nearer to town than the Buckhead Theatre (R. 133). It had a seating capacity of about 500 seats (R. 838), until it was completely renovated during the later part of 1958, the name changed to Fine Arts Cinema Theatre, and the seating capacity reduced to 370 seats (R. 134).

The defendant Atlanta Enterprises, Inc. (hereinafter referred to as Atlanta Enterprises) had since at least 1932 or 1933 operated the Fox, Paramount, Roxy and Capitol theatres in Atlanta (R. 696, 713). It ceased to operate the Capitol Theatre between 1946 and 1949 (R. 597), the building having been converted into a department store. The Paramount Theatre

was torn down about July, 1960 to build an office building. The Fox and Roxy Theatres continued in operation (595).

Prior to January 1, 1950 the stock of Atlanta Enterprises was controlled by Paramount Pictures, Inc., or a corporation affiliated with it (R. 695, 753); since that time Paramount Pictures, Inc. had divested its theatre interests pursuant to the decrees in the Paramount Case, and the stock of Atlanta Enterprises, Inc. has been 100 per cent owned by United Paramount Theatres, Inc. (later named American Broadcasting-Paramount Theatres, Inc.) (R. 621).

Defendant Wilby-Kincey Service Corporation (hereinafter referred to as "Wilby-Kincey") has been engaged since prior to 1938 (R. 693) in supervising the operation of theatres, including since 1951, the Fox, Paramount and Roxy Theatres of Atlanta Enterprises in Atlanta, and licenses and books motion pictures for exhibition in those theatres. Prior to 1950 Paramount Pictures, Inc. owned directly or indirectly stock in the theatres for which Wilby-Kincey was buying and booking and managing. Some of the theatres were 100 per cent owned (R. 530) and in other theatres Mr. Wilby and Mr. Kincey had a stock interest together with Paramount (R. 529-530). About 1950 Paramount Pictures, Inc. divested its theatre holdings pursuant to the terms of the *Paramount Decrees*, and all those theatre corporations in both the Atlanta and Charlotte exchanges for which Wilby-Kincey had been buying and booking and in which Paramount Pictures had an interest were acquired by United Paramount Theatres (R. 533-534). Since January 1, 1950 Wilby-Kincey has been 100 per cent

owned by United Paramount later named American-Broadcasting) (R. 621) after January 1, 1950 Wilby-Kincey bought and booked only for theatres that were wholly controlled by United Paramount (later American Broadcasting-Paramount) with the exception of two theatres (R. 622).

The defendant exhibitor Evans Amusement Company operated the Loew's Grand theatre in Atlanta which had a seating capacity of about 2200-2400 (R. 656). The defendant Evans was part of the Loew's Theatre circuit of about 120 to 150 theatres, and was affiliated with the distributor defendant Loew's, Inc. (R. 645-650, 653-654).

First-Run Product Play-Off in Atlanta

For many years there had been in effect in Atlanta an unchanging pattern or structure as to what customer each of the defendant distributors regularly served its pictures to first-run. Harrison, the Wilby-Kincey buyer and booker, testified that when Wilby-Kincey took over the management of the Atlanta first-run theatres from Lucas and Jenkins in 1951, there was a division and split of product in existence. Loew's Grand was using Loew's product, United Artists' product, and one-half of the Universal product based on a national split. Harrison did not distrub that division or split. The pictures of the defendant Columbia and some R. K. O. pictures were the only pictures playing at the independent Rialto Theatre (R. 599). Harrison testified that there was not at any time up to June, 1961 any competition between defendants Wilby-Kincey and Evans for first-run pictures in Atlanta (R. 599, 601-602).

The evidence showed that the same basic pattern or structure as to the product of the defendant distributors playing the first-run theatres of the defendant exhibitors Atlanta Enterprises and Evans had been in effect as far back as at least 1941 (R. 466-468). Representatives of the defendant distributors generally testified that they knew there was no competition for their product between the Loew's Grand of Evans and Wilby-Kincey (R. 123, 188, 258-160).

The Uniform 30-Day Clearance in Atlanta

The evidence showed clearly that all the distributors uniformly served on a clearance of thirty or 28 days first-run over second-run in the city of Atlanta during the entire damage period from 1952 to 1961 (R. 126, 127, 230-31, 261, 319-320, 396, 550) except that the defendant United Artists changed to a 21-day clearance on October 19, 1960 (R. 193). The 28-day clearance was simply a re-wording of the 30-day clearance, and in effect the 28 and 30-day clearances were substantially the same thing (R. 206, 410).

Efforts Of Petitioners To Obtain First Run Or Reduced Clearance

The evidence showed that it was of value to play a picture on a first-run or on a national or territorial release date availability, and that it was valuable to an exhibitor to play as soon as possible after national or territorial release date if he was not on first-run (R 207-208, 288, 663, 738).

The chief stockholders of the plaintiff corporation, except for one share, during most of the damage pe-

riod were Mr. and Mrs. John Carter. When they acquired the stock of the plaintiff Buckhead Theatre Company in 1953, the Buckhead Theatre was on a first break availability, 30 days after first-run (R. 763, 764, 768, 774-775, 951). The Buckhead Theatre had been on a subsequent run availability as far back as 1942 (R. 179).

Almost immediately after their acquisition of the corporation, the Carters commenced a complete remodeling and redecorating of the theatre. The total amount spent on the renovations, including the installation of Cinemascope later in the year, was about $25,000 (R. 773). Even before the completion of the renovations, Mr. Carter began talking to all the defendant distributors about a better availability for the Buckhead Theatre (R. 765). From early 1953 through June of 1961, Mr. Carter had repeated conversations with representatives of the defendant distributors requesting first-run pictures for the Buckhead Theatre. He pointed out, among other things, that the theatre could produce adequate revenue for first-run that would be profitable for the distributor, as well as the theatre, and that the Northside was the most progressive and largest community in Atlanta, located where it drew from the entire area. He requested also, if the theatre were not to be granted first-run pictures, could it be allowed to play pictures on a move-over run, or on a clearance of seven days or fourteen days after first-run (R. 766, 778-782, 792-94, 796, 807-808, 819, 821, 823, 834-36, 840-842, 844, 846-861, 863-69, 876).

Despite these requests for a first-run product, or a reduction in the clearance, with the exception of a

short period when it played on a later availability to obtain release in film rental terms, the Buckhead Theatre remained on the so-called first break availability, 28 or 30 days after first run on the product of all the distributors except United Artists throughout the entire period ending June 30, 1961 (R. 774-777, 782-786, 788-789, 812-814, 818, 820-822, 846-848).

Mr. Carter repeatedly requested a reduction in clearance on behalf of the plaintiff Garden Hills Theatre Company during the period from 1953 until late 1958 when the Garden Hills Theatre was renovated (R. 876-877). That Theatre had been playing 42 days after first-run on the product of the defendant distributors prior to the acquisition of the stock by the Carters, and continued on that availability or past availability until it was completely renovated in 1958 (R. 880, 876-878). Repeated requests for first-run product for the Fine Arts Cinema Theatre were made by the Carters to all the defendant distributors (except R. K. O., which had gone out of business) from the middle of 1959 through June 30, 1961 (R. 853, 857, 860, 864, 865, 866, 870-871, 876, 882-883).

Uniform Denial of First-Run Product to Petitioners

The defendant distributors uniformly refused to offer plaintiff Buckhead or plaintiff Garden Hills any first-run pictures, unless those pictures had previously been rejected by the first-run downtown theatres of the defendant exhibitors and by the Rialto (R. 142-143, 255, 287, 352, 359, 363, 509, 852, 859).

The plaintiffs claim this uniform refusal was the result of conspiracy, as alleged in count one and

two of each complaint. Representatives of defendant distributors testified: as to the value of the larger seating capacity in some of the downtown theatres of the defendant exhibitors (R. 163-164, 212, 240-241, 308); that there was an advantage to the downtown location for a first-run (R. 212); and that if the distributor moved up the Buckhead Theatre to first-run it would have to move up other suburban-run theatres in Atlanta to first-run (R. 212-213, 306).

The plaintiffs offered evidence which tended to rebut these arguments. The overhead of the Fox Theatre was about $6500 per week (R. 592), and because of that some pictures at the Fox Theatre grossed $15,000 or $16,000 in the first week and did not even play a subsequent week (R. 608). Many of the largest first-run grosses on pictures playing in Atlanta during the damage period were produced at the Rialto Theatre, less than 100 seats larger than plaintiff's Buckhead Theatre. The largest gross produced in Atlanta was $365,000 on a picture Ben-Hur at the Roxy Theatre, and at that time the theatre was using eight or nine hundred seats (R. 306, 611-612). The one thousand-seat Rialto Theatre played the Universal picture Grass is Greener for five weeks for a total gross in excess of $30,000. The Universal branch manager testified that that picture had grossed $8886 the opening week at the Rialto and that if it had been playing the Fox Theatre of Atlanta Enterprises it undoubtedly would not have continued to play after the first week. There was evidence that the 1000-seat Rialto Theatre could gross as well or better than theatres of the defendant exhibitors which had twice its seating capacity (R. 185, 341-343). There was also evidence that the Rialto was an uncomfortable thea-

tre (R. 1113) and that the first-run product is the most important thing in turning out large grosses at any theatre (R. 1113).

The plaintiffs claimed that the defendant distributors could have grossed and have been paid more film rental by licensing some of their pictures to the Buckhead or Garden Hill Theatres instead of the downtown theatres of the defendant exhibitors. (R. 842). There was evidence that the quality of the pictures of defendant distributors which had played first-run at the Fine Art Cinema was inferior to pictures played at the downtown first-run theatres (R. 436-437, 862). However, four of the pictures played at the Fine Art Cinema on an extended engagement had each produced for the distributor between $7000 and $8000 film rental. (R. 848-849), and that a very substantial number of pictures of superior quality playing the Loew's Grand and the Fox Theatre did not produce that much film rental (R. 137, 242, 340; Pl. Ex. Nos. 270-279, 283-292).

Knowledge of Distributors

The evidence showed that the representatives of the defendant distributors kept well informed of what was going on in the business, and knew what other distributors were doing. Various distributor representatives testified of knowledge that the other companies were serving on a 30 day clearance first-run over second run in Atlanta (R. 174, 181, 285, 396, 485), and that they knew of the pattern in Atlanta as to what distributors were serving what first run theatres (R. 258-260, 408, 466-68). Certain of the distributors testified they kept informed in a general way of

the quality and number of pictures put out by other companies (R. 258, 285), that generally other distributors served on the same availabilities as their company (R. 258, 489) and that they had knowledge of the availability and product of other companies playing at each of the plaintiff's theatres (R. 196, 408-409). Various of the defendant distributors testified as to their knowledge of the control of the Loew's Grand Theatre by the distributor Loew's Incorporated and their knowledge of the interest of Paramount Pictures, Inc., and later of United Paramount and American Broadcasting, of theatres in the Atlanta Exchange Area (R. 259, 466, 478-479).

Film Rental Discriminations

There was ample evidence that the plaintiffs were charged excessive film rentals by defendant distributors for pictures licensed to the Buckhead and Garden Hills theatres on a second or subsequent run. Mr. and Mrs. Carter testified that in instances where they were required to pay the same or higher percentage than the first run had been charged, that it was unreasonable (R. 885-910, 971-981). The contention of plaintiffs that this constituted an unreasonable discrimination in film rental seemed to be supported by testimony of many of the defendant distributors (R. 130, 131, 229, 397, 475).

Opinion Evidence of Damage

Expert opinion evidence was offered by petitioners as to what the gross receipts and film rental and advertising expenses would have been at each of petitioners' theatres during the damage period if those

theatres had reasonable access to first-run product of the defendant distributors. Such evidence was also offered by petitioner Buckhead as to what the gross receipts, film rental and advertising expense at the Buckhead Theatre would have been during the damage period on a reduced clearance. The expert opinion evidence was admitted by the Trial Judge over the objection of defendants.

ARGUMENT

I. Impact of Condemned Paramount Case Acts and Practices in Atlanta 1938 through 1961, inclusive.

The evidence showed clearly the existence in Atlanta in 1945 and before of the local counterpart of the conspiracy condemned in the Paramount case. The conspiracy was complete with the uniform structure of runs and clearance, favoring first-run theatres affiliated with the Paramount Case defendants Loew's and Paramount, together with master contracts, franchises, formula deals and other condemned practices that tended to tie up the product and exclude competition. Although some of the condemned methods of excluding competition (such as formula deals, admission price fixing and master agreements) were abandoned by the defendants after 1945, the evidence shows that the same conspiracy continued after 1945 and throughout the damage period. After 1945 and throughout the damage period all the defendants continued to maintain the same uniform structure, protecting the first run theatres of the same defendant exhibitors, and continuing to exclude competition from independent exhibitors such as petitioners.

A. Impact of Condemned Paramount Case Acts And Practices In Atlanta, 1938 through 1945

Uniform Clearance Structure. The evidence shows the existence of a 60 day clearance in favor of the theatres of the defendant Atlanta Enterprises (then a Paramount affiliate) on Paramount product as far back as 1938 (R. 733-734). While that 60 day clearance was in effect, Jenkens knew of no distributor who did not serve on that clearance (R. 731). The 60 day clearance was still in effect in Atlanta in 1946 (R. 579-580). The Southern sales manager for Warner who had been branch manager in Atlanta in 1941 testified that generally all the distributors had the same clearance in the Atlanta exchange area (R. 489-490).

Affiliation of Defendant Exhibitors With Defendants Paramount and Loew's. In 1945 and before, theatres affiliated with the defendant distributor Paramount and Loew's were playing the product of the defendant distributors except Columbia which played at the independent Rialto. The defendant exhibitor Evans operated the Loew's Grand Theatre and was controlled directly or indirectly by Loew's Incorporated which also controlled about 150 theatres throughout the United States (R. 645, 649, 650, 653-654). During this period the defendant exhibitor Atlanta Enterprises, Inc. was controlled by Paramount Pictures, Inc., or a corporation affiliated with it (R. 695, 753).

Split of Product Between Defendant Exhibitors Affiliated With Paramount Case Defendants. As far back as 1941 the product of the defendants Paramount, Fox and Warner was playing at the first-run

theatres of Atlanta Enterprises, and the Loew's product and the pick of the United Artists product was playing the theatre of the defendant Evans. Only the Columbia product was playing at the independent Rialto (R. 467).

Admission Price Fixing. In the Paramount Case it was found that defendants have fixed minimum admission prices in contracts and that exhibitors could not charge lower prices under such contracts (66 F. Supp. 323, 334-41). There is evidence in the period prior to 1945 in this case of clearance being based on the admission price charged by exhibitors, and that if the admission price is lowered the period of clearance is increased (R. 734-738).

Formula Deals. Formula deals were condemned in the Paramount Case as unreasonable restraints of trade (334 U.S. 131, 153-54). There is evidence of the existence of formula deals in the present cases in the period prior to 1945 (R. 729-730, 754-757, 1094-1099).

Franchises. Paragraph 89 of the findings of fact of the Expediting Court of February 8, 1950 states in part: "Franchises have been entered into by distributor-defendants with affiliated and non-affiliated circuits which unreasonably restricted the opportunities of small exhibitors to license films in competition with the theatres of such circuits by tying up the films released for long period of time. "There was evidence of franchises in existence in the City of Atlanta in the period prior to 1945 (R. 730, 733-34, 653).

Master Agreements. Master agreements that cover exhibition in two or more theatres in a particular

circuit and allow the exhibitor to allocate the film rental paid among the theatres as it sees fit, and to exhibit the features upon such playing time as it deems best, and leaves other terms to the discretion of the circuit were condemned in the Paramount Case 334 U.S., 131, 154. There is evidence of such a master contract in this case, Pl. Ex. 195, executed in 1943 and licensing to Paramount Pictures at a lump sum rental for each picture over the entire Lucas and Jenkins circuit for 45 theatres in 13 towns, including in Atlanta the Capitol, Fox, Paramount and Roxy theatres of Atlanta Enterprises (R. 721-723).

Move-Over Runs and Pooling Agreements. There was evidence in this case of move-over runs and pooling agreements in Atlanta in 1945 and before (R. 461, 679). These practices were condemned in the Paramount Case, 334 U.S. 131, 149, 160. Clearly there can be no doubt from this evidence of the impact of the condemned Paramount case acts and practices in Atlanta in 1945 and before. The evidence showed the uniform structure of runs and clearance, favoring first-run theatres of the defendant exhibitors affiliated with the Paramount Case defendants Loew's and Paramount, together with master contracts, franchises, formula deals, and other condemned practices that tended to tie up product and exclude competition.

Each of the plaintiff corporations was in existence and operating its theatre playing on a subsequent run availability, subject to the uniform structure of runs and clearance as far back as 1941 (R. 179).

(B) Impact Of Condemned Paramount Case Acts and Practices In Atlanta 1946 through 1961.

Uniform Clearance Structure In Atlanta After 1945. The uniformity of clearance of the defendant distributors in Atlanta continued in effect after 1945 and throughout the damage period. The 60 day clearance first run over second run was still in effect in Atlanta in 1946, and also in the towns in Tennessee and Alabama where Wilby-Kincey was buying and booking for theatres controlled by Paramount Pictures, Inc. (R. 579-580). There were reductions in the uniform clearance of the defendant distributors in Atlanta to 45 or 42 days (R. 125, 319, 480-81) and later to 30 days. By the commencement of the damage period in 1952 the first run clearance over second run in Atlanta was a uniform 30 or 28 days clearance with all defendant distributors (R. 126, 550). This uniform clearance continued in effect with all the defendant distributors through the entire damage period to June 30, 1961 (R. 127, 230-31, 281, 319-320, 396) except that United Artists made the change to a 21 day clearance in October of 1960 (R. 193). Plaintiff's Buckhead Theatre was subject to this uniform 28 or 30 day clearance during the damage period on the product of all defendant distributors, while the plaintiff Garden Hill's' Theatre was subject to a 42 day clearance until at least 1958.

Arbitrary Nature of Uniform 30 Day Clearance. Various distributor representatives testified of knowledge that other companies were serving on a 30 day clearance first-run over second-run in Atlanta (R. 174, 181, 285, 396, 485). Although defendant distributors profess that the uniform 28 or 30 day clearance

was reasonable, they did not generally give consideration to the factors which this Court has stated are important in determining the reasonableness of clearance, U.S. v. Paramount 334 U.S. 131 (R. 127, 205, 282-283). No defendant distributor had any knowledge of any detailed survey ever having been made of the drawing area of the downtown first-run theatres in Atlanta (R. 147-148, 203-204, 373, 415). The rigid and arbitrary nature of the 30 day clearance in Atlanta is further illustrated by the fact, that the same uniform and arbitrary 30 day clearance was in effect in all the key or larger towns in the Atlanta exchange area (which included most of Georgia, Tennessee and Alabama); and in all but two towns which Wilby-Kincey was managing theatres for American Broadcasting-Paramount Theatres, Inc. (R. 132, 206, 232, 281-282, 396, 580). That same 28 or 30 day clearance was in effect in those towns irrespective of the fact that the towns varied with regard to the facts which this Court declared should be taken into consideration in determining clearance: Such as population of the City in which the theatre was located: the admission prices charged: the distances between the theatres: the public transportation facilities: and all other factors that should determine clearance between theatres (R. 206-207, 233-234, 487-488). See United States v. Paramount, 334 U.S. 131. The defendants were obviously consulting their own interests and convenience and disregarding the solemn effect of a judgment and decrees of a United States District Court.

Harrison of Wilby-Kincey who during the entire damage period bought and booked for all theatres of American Broadcasting-Paramount Theatres, Inc. in

Georgia, Tennessee and Alabama, including the theatres of the defendant Atlanta Enterprises, and always opposed any reduction in clearance (R. 583-584), stated that all his life in the theatre business he had heard talk of factors such as seats, distances of theatres, projection, sound, location of people, population, and transportation facility between theatres involved, and as yet to him they were *"just words"* (Emphasis Supplied). But Harrision admitted that if all these factors involved were considered for each theatre the clearance would not be the same, but would vary (R. 581-582, 584).

Theatre Holdings Of The Defendant Exhibitor. Despite the Paramount Case the defendant distributor Loew's continued until at least 1959 to be affiliated with the defendant exhibitor Evans which operated the Loew's Grand Theatre in Atlanta. During that period the Loew's Theatre Circuit consisted of at least 125 theatres throughout the Country. (R. 653-654). Paramount Pictures, Inc. divested itself of all interest in theatres throughout the country, and as of January 1, 1950 United Paramount (later named American Broadcasting Paramount) owned all the stock of the defendant exhibitor Atlanta Enterprises, and many other theatre operating companies in the Atlanta Exchange Area in which Paramount Pictures had formerly had a stock interest (R. 528, 561) However, there was no change in the structure of runs and clearance in Atlata when Wilby-Kincey, also 100% owned by United Paramount, took over the management of the defendant Atlanta Enterprises in 1951 (R. 621). Although Atlanta Enterprises, Inc. was not directly controlled by any distributor after January 1, 1950, it was a subsidiary of United Paramount

(later American Broadcasting Paramount) which controlled a chain of at least 475 to 500 theatres throughout the United States during the entire damage period (R. 534, 699). Those were all theatres in which prior to January 1, 1950 Paramount Pictures, Inc. had held a stock interest.

Split of Product between Defendant Exhibitors After 1945. After 1945 and until at least 1959 there was no change in the basic structure in Atlanta as to which distributors sold first run product to the defendant exhibitors. The first run theatres of Atlanta Enterprises and the defendant Evans continued to control the product of all the defendant distributors except Columbia and some RKO. The division or split of product in effect in 1951 continued in effect in the damage period. There is no competition between Atlanta Enterprises and the defendant Evans's Loew's Grand Theatre even after the start of competitive bidding in 1958 and 1959 (R. 599).

The strong evidence of the continuance after 1945 and throughout the damage period of the previously existant structure of runs and clearance in the City of Atlanta, becomes overwhelming when coupled with the admission of certain representatives of the defendant distributors.

Wilson, who had had a supervisory position of branch manager or higher over the Atlanta Exchange since period to 1942 (R. 118), testified that the system of merchandising pictures by using a first-run downtown and subsequent runs in the neighborhood had been followed for a long time, and they tried to con-

tinue to follow it (R. 161). The regional salesmanager of Paramount, with supervision over Atlanta, Charlotte, Memphis, Jacksonville, and New Orleans, testified that in 32 years in the motion picture picture business distribution of pictures in the cities had been by a series of staggered runs and clearances (R. 222-223, 260-261). The Warner representative testified that clearances and availabilities in the Atlanta exchange have generally been the same with all companies since 1941 (R. 489-509). Settoon who had been branch manager for Universal in Memphis as well as Atlanta, testified that the series of runs in Atlanta, a downtown first-run, then a subsequent run, and so forth and so on, was the method by which motion pictures had been distributed in his 25 years in the business, that he knew of no other, and it had been adopted as the policy all over the country (r. 447-448).

II. Although Some of the Condemned Paramount Practices were Abandoned After 1945, Clearly the Pre-1945 Paramount Conspiracy Continued After 1945 and During Petitioners' Damage Period.

The opinion of the Fifth Circuit in this action apparently places some weight on the fact that the defendants after 1945 abandoned some of the condemned Paramount practices such as admission price fixing, master contracts, formula deals, etc. (p. 368). Petitioners pointed this out, supra, in the section with regard to impact of Paramount practices after 1945. However, petitioners also point out that despite the abandonment of some of the aforesaid

practices, there is no basic change in the pattern or set-up in Atlanta which favors theatres of the defendant exhibitors, affiliated or formerly affiliated, and continues to exclude plaintiff and other independent exhibitors from competition with these favored defendant exhibitors, by means of the continuing uniform structure of runs and clearance, split of product and elimination of competition, and by other means specified.

Apparently the Fifth Circuit did not recognize that the condemned admission price fixing, formula deals, master contracts and franchises were not ends in themselves in the Paramount Case, but were among the means used to exclude competition with the favored first-run exhibitors. As this Court pointed out in the Paramount case, 334 U. S. 131 "The main contest is over the cream of the exhibition business — that of the first-run theatres" [166], and one of the main objections to formula deals and master contracts is that "they eliminate the opportunity for the small competitor to obtain the choice first-runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators." [154] Likewise, with regard to admission price fixing, "in effect, the distributor, by the fixing of minimum admission prices, attempts to give the prior-run exhibitors as near a monopoly of the patronage as possible." Findings of Fact, February 8, 1950. However, the elimination of these particular illegal practices has not affected the uniform structure of runs and clearance in Atlanta favoring the affiliated and formerly affiliated exhibitors. There is no more opportunity for an independent exhibitor to compete

for first-run during the damage period than there had been prior to 1945. In *Paramount* this Court stated "the central problem presented by these cases in which exhibitors get the highly profitable first-run business" 334 U. S. 131, 167. The defendant distributors and exhibitors after 1945 do not use the enjoined franchises, master contracts and formula deals to protect the first-run theatres, they simply state that they have regular first-run customers and will not even negotiate with anyone else, unless they are unable to sell their regular customers (R. 142-143, 255, 352, 359, 363, 509, 852, 859). Thus, the effect was the same after 1945 as it had been before, the first-run product is tied up for the defendant exhibitors to choose what they want. The same regular customers are favored after 1945. The defendant exhibitor Evans continues its affiliation with the distributor Loew's until 1959, and the defendant exhibitor Atlanta Enterprises, affiliated with Paramount prior to 1950, is after 1950 controlled by the American Broadcasting-Paramount which had a chain of at least 475 to 500 theatres during the damage period (R. 534, 654, 699).

In other ways these defendants have completely ignored and disregarded the solemn decrees of a United States District Court. The Paramount Consent Judgment of March 3, 1949 provided in part in Sec. C1 that Paramount or the New Theatre Company should dispose of all interest of Paramount in certain theatres listed within times specified: "for the purpose of creating substantial motion picture theatre operating competition in the communities hereinafter listed." Among the theatres listed are: One first-run theatre in Atlanta, Georgia and Chattanooga, Tennes-

see, and two first-run theatres in Knoxville, Tennessee.

Petitioners have no information as to how these requirements were satisfied in Atlanta. It has been noted that the Capitol Theatre was dismantled, and the building became part of a department store by 1949 or before (R. 597). At any rate, no theatre of the defendant Atlanta Enterprises was made available to any independent exhibitor, and the split of product between the defendant exhibitors continued in effect in Atlanta in 1951 and after (R. 599).[1]

The evidence does show, however, that at the time the new theatre company, United Paramount, disposed of first-run theatres in Chattanooga and Knoxville "for the purpose of creating substantial motion picture theatre operating competition", Harrison made agreements with Simpson to eliminate competition between them, by a split of the product in each situation. The great advantage went to Wilby-Kincey on the split. The five best companies as to quality and number of pictures at that time were on the

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[1]The fact that Atlanta Enterprises and Loew's Grand would not compete with each other in Atlanta, both before and after the divestiture, is typical of the relationship between exhibitor-defendants in the Paramount Case. In the findings of fact of February 8, 1950, ¶156 and 156a are as follows:

156. In the relatively few areas where more than one of the major defendants had theatres, competition for first-run licensing privileges was generally absent because the defendants customarily adhered to a set method in the distribution and playing of their films.

156a(a). A study of four seasons between the years 1936 and 1944 shows that during this period the privilege of first-run exhibition of a defendant's films was ordinarily transferred from one defendant to another only as the result of dissolution of a theatre operating pool or an arbitrary division of the product known as a "split."

Wilby-Kincey side of the split (R. 535-539). Similar agreements for split of product were made with exhibitors taking over theatres divested in many other Wilby-Kincey towns in the Atlanta exchange (R. 547-549, 555-556). If agreements such as these constituted competition, then it is difficult to conceive what would constitute an elimination of competition. Furthermore, in almost every instance where a theater is divested in the Atlanta exchange area by United Paramount pursuant to the decree, it is taken over by a former employee of Wilby-Kincey or the Paramount Theatre Operating Company (R. 547-548). Harrison, the chief buyer for the United Paramount Theatres in the Atlanta exchange area (Georgia, Tennessee and Alabama) after the divestiture is the same man who bought and booked for the Paramount Wilby-Kincey theatres in Alabama and Tennessee prior to the divestiture (R. 552-553). The same man who is vice-president of Paramount Pictures, Inc. and head of its theatre department up to 1949, Leonard Goldenson, becomes, as of January 1, 1950, president of the new theatre company, United Paramount, organized to take over the theatres of Paramount Pictures, Inc. (R. 547-549, 555-556).

During the period from 1950 through 1961, United Paramount later ABC-Paramount controlled not only exchange areas; but also controlled a large number of other theatres throughout the United States in which Paramount Pictures, Inc. had formerly held a stock interest totaling in all about 475 to 500 theatres. (R. 534, 599, 622). Since 1951 Wilby-Kincey had entered into a split or division of product with practically every competitor in every town in which it operated (R. 620).

There can be no question that a split or division of product eliminates competition for the obtaining of pictures between the exhibitors who are parties to that agreement. Petitioners do not urge that a split of product is per se a violation of the anti-trust laws. However, the splits of product made by United Paramount, the new theatre company, with knowledge of the defendant distributors, certainly have an added significance because the decrees had required the divestiture of the theares in order to stimulate competition, and at the same time that the divestiture is accomplished represenatives of the new theatre company, United Paramount, make agreements to eliminate competition with the indivduals or corporations to which the theatres were sold. It is difficult to imagine a more blatant disregard of the sanctions of this Court and the Expediting Court, and the distributor defendants have full knowledge of the splits.

III. It Was Not Necessary for Petitioners to Establish a Nationwide Conspiracy with Evidence Independent of the Paramount Decrees in Order for the Decrees to be Admissible in Evidence

It appears that the opinion of the Court of Appeals for the Fifth Circuit in sustaining the Trial Court's exclusion of the Paramount decrees as to the distributor defendants is based in large part on the fact that petitioners did not establish the national conspiracy with evidence independent of the Paramount decrees. The Fifth Circuit stated: "We simply hold however, that there being no evidence of a national conspiracy, proof of the Paramount decrees would be irrelevant to any issue pending before the Trial Court." (369). This holding is clearly contrary to the

ruling of this court in *Theatre Enterprises* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 and *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558. This court held in *Emich Case* that the plaintiffs only need show local impact on them of the general conspiracy established in the government case.

The following are other cases where plaintiff alleged a nation-wide conspiracy, and the Paramount decrees were admitted in evidence when plaintiff proved local impact of some of the condemned practices. *Theatre Enterprises*, Inc. v. *Paramount Film Distributing Corp.*, 346 U.S. 537, aff'g (C.A. 4) 201 F. 2d. 306. *Tivoli Realty, Inc. v. Paramount Pictures, Inc. (CA. 5) 209 F. 2d. 21. Columbia Pictures Corporation* v. *Rubenstein, Inc.* C.A. 8, 1961 C.C.H. Trade Cases, ¶69,996 at pp. 77,968, aff'g 176 F. Supp. 527 (Minn. 4 Div. 1959). *Twentieth Century Fox Film Corp.* v. *Brookside Theatre Corp.* (C.A. 8) 194 F. 2d. 846, cert. den. 1952. *Homewood Theatre v. Loew's, Inc.* (Minn.) 110 F. Supp. 398. *New Amusements* v. *Knoxtenn Theatres, Inc.* E.D. Tenn.).

In Theatre Enterprises v. Paramount Film Distributing Corp., supra, the plaintiff's damage period commenced after 1945 and portions of the decrees were admitted in evidence. In *Theatre Enterprises* the plaintiff "was asserting the existence of a national conspiracy which happened to have its impact in Baltimore." 201 F. 2d. 306 at 314. However, although plaintiff alleged a nationwide conspiracy affecting it in Baltimore, neither the Trial Judge, the Court of Appeals nor this Court required that plaintiff establish a nationwide conspiracy. The language of the Trial Judges' charge which this Court approved required

that plaintiff who had alleged a nationwide conspiracy only prove a conspiracy affecting the plaintiff in Baltimore, i.e. local impact. The language in this charge also stated that the nationwide adjudications in the *Paramount Case* were the prima facie evidence as to plaintiff's claim for damages to it in the Baltimore area. 346 U.S. 537, 542-543.

The Paramount decrees are even admissible in evidence where a plaintiff has alleged damage solely from a local conspiracy in the vicinity of its theatre. *Don George, Inc. v. Paramount Pictures, Inc.* (D.C. La.) 111 F. Supp. 458, 468-469. *Loew's, Inc. v. Cinema Amusements, Inc.* (C.A. 10) 210 F. 2d. 86. *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.* (C.A. 7) 213 F. 2d. 284. In view of the cases cited it is clear that it was only necessary for petitioners to establish local impact of some of the condemned Paramount practices in order for the Paramount decrees to become admissible.

IV. The Paramount Decrees Were Admissible As Prima Facie Evidence of a National Conspiracy Up To 1945.

Petitioners do not claim, as the Fifth Circuit seems to believe (P. 369) "that the prior decrees may be introduced for the purpose of establishing in and of themselves the existence of a conspiracy at a latter date." Petitioners simply claim that the decrees may be introduced as prima facie evidence of a national conspiracy up to 1945. The evidence actually before the jury showed the existence of condemned Paramount practices in the Atlanta area during that period, and in Atlanta and the Atlanta exchange terri-

tory and elsewhere after 1945 and throughout the damage period. Significantly petitioners did not allege a conspiracy commencing in 1952, but alleged damage from a continuing nationwide conspiracy entered into by the defendant prior to 1940, which conspiracy was alleged to have continued until 1956, the filing dates of the complaints. Supplemental complaints in each case alleged the continuation of the conspiracy from 1955 to 1961.

The fact that the statute of limitations operated to bar any claim for damages by these petitioners prior to 1952, who had filed their claims in 1956, does not affect the fact that the defendants in each case were alleged to have entered into the conspiracy charged prior to 1940. The Trial Court recognized this fact and evidence offered by petitioners was admitted prior to the damage period, and in some instances going back to the early 1940's.

V. The Paramount Decrees are Not Inadmissible Because Petitioners' Damage Period Commenced After 1945.

The thrust of the argument of Respondents in the Court below was that the decrees were inadmissible as a matter of law because the damage period commenced after 1945. This was the holding of *Park Neponset v. Smith*, 258 F. 2d. 452 (1st Cir. 1958), and *International Shoe* v. *United Shoe* F. 2d. (1st Cir. 1963). Petitioners contended that this Court's ruling in *Theatre Enterprises* v. *Paramount*, *346 U.S. 347* clearly rebutted this position. The Fifth Circuit stressed the statement of this Court in Theatre Enterprises that "Indeed, the relevancy of Paramount to

the instant case is slight," and concluded that since petitioners' damage period commenced three years later than that before this court and Theatre Enterprises that "whatever relevance there may have been in *Theatre Enterprises* would have vanished completely" (p. 369). The relevance of Paramount to the instant cases is not determined by the passage of time, but by the extent to which petitioners were affected by condemned Paramount acts and practices. Although petitioners damage periods commenced three years later than the damage period in *Theatre Enterprises*, the relevance of the Paramount case is immeasurably greater in the instant cases. Petitioners have already demonstrated the impact of Paramount case acts and practices in Atlanta after 1945, as well as before: but a comparison of the situations in Baltimore and Atlanta would serve to emphasize the greater relevance of the Paramount decrees to the instant cases.

In *Theatre Enterprises* plaintiff's theatre did not commence operation until 1949, and there is no mention of evidence prior to 1948. In the instant cases petitioners' theatres were actually in existence during the Paramount period, and subject to the Paramount condemned practices. The arbitrary structure in effect in the damage period is a continuation of the structure in existence in 1945 and before. In *Theatre Enterprises* the plaintiff made no complaint about the clearance being unreasonable: but in the instant cases petitioners not only claimed that the clearance was unreasonable and offered evidence as to its arbitrary and unreasonable nature, but also offered evidence, which the Court allowed, as to the damage it had incurred from the unreasonable clearance. In

Theatre Enterprises 63% of the first run exhibitions had been at theatres of independent exhibitors, while in the instance cases until at least 1959 all the defendant distributors (except Columbia and RKO) licensed exclusively first run theatres controlled by theatre circuits affiliated with Loew's and formerly affiliated with Paramount.

In addition to Theatre Enterprises, supra, the Paramount decrees have been held admissible in other actions, where plaintiff commenced operation of his theatre after 1945. *Tivoli Realty, Inc.* v. *Pictures, Inc.* (CA 5, 1954) 209F. 2d. 41. *Basle Theatres, Inc.* v *Warner Bros. Pictures Distributing Corp.* (N.D. Pa., 168 F. Supp. 553, 559. *New Amusements v. Knoxtenn Theatres*, Inc., (E.D. Tenn. N.D., unreported decision, May, 1960, Taylor, D.J.). In the instant cases, although petitioners' damage begins after 1945, their theatres were in operation and subject to the structure in Atlanta during the pre-1945 period. Likewise, in *Webster Rosewood Corp'n* v. *Schine Chain Theatres*, Inc. (N.D. N.Y.) 157 F. Supp. 251, 255; aff'd (C.A. 2) 42. F. 2d. 152, 154; findings by Judge Knight in *United States* v. *Schine* (334 U.S. 117, 130) were admitted, even though plaintiff commenced to operate its theatre after the period covered in the government suit.

VI. The Paramount Decrees and Judgments Together With Evidence Before the Jury Warranted Submission of Count One to the Jury.

Petitioners submit that if the Trial Court had admitted the Paramount decrees in evidence, there was

ample other evidence before the jury which together with the Paramount decrees warranted sumbission of Count one of each complaint to the jury. This question was not determined by either the Trial Judge or by the Court of Appeals for the Fifth Circuit, since both courts ruled the Paramount decrees inadmissible. However, the language of the District Judge indicates that the granting of the motion for dismissal or direction of a verdict as to Count one was a consequence of the exclusion of the Paramount decrees. The Trial Court stated: "Well, I think it follows the Court's ruling with respect to the Paramount decree, that the first count of the complaint would have to go out." (R. 1145)

Petitioners have already pointed out the continuance in Atlanta after 1945 of the uniform structure of runs and clearance, the continued elimination and exclusion of competition, and the impact on petitioners who were trying to improve the availability and run of their theatres. However, it should also be noted that there was substantial evidence, mostly from defendants' own witnesses, of the continuance of the general and national conspiracy and of its acts and practices after 1945, not only in Atlanta, but also throughout the Atlanta exchange territory, and elsewhere.

The Atlanta exchange territory consisted of the state of Georgia and parts of the states of Tennessee and Alabama. A uniform 60 day clearance of first-run over second-run, and later a uniform 45-day clearance, was in effect in towns in which Wilby-Kincey managed theatres in the Atlanta exchange area (R. 125, 319, 480-481, 579-580). By 1954 or 1955 the uniform 30-day clearance of first-run over second-run was

in effect in either all towns or at least the larger situations in the Atlanta exchange area (R. 132, 206, 233, 281-282, 396, 487, 580). The same clearance that generally prevailed with all the defendant distributors in the Atlanta exchange territory since as far back as 1941 (R. 489). For 27 years the clearance of Universal and other companies had tended to be standardized not only in the Atlanta exchange area but in the Memphis area (R. 396). The Universal branch manager testified that he had no knowledge of how the system or structure of runs and clearances came into effect anywhere, but stated that it was a uniform thing over the United States (R. 448-449).

Master contracts were executed between Wilby-Kincey and various defendant distributors during the damage period covering the theatres of Atlanta Enterprises, and theatres of American Broadcasting-Paramount in Georgia and Tennessee. These master contracts or multiple theatre schedules specified the terms separately for each theatre, but generally a picture was licensed at the same percentage terms to all the Wilby-Kincey theatres (R. 552-575, 572, 579, 590, 591). Harrison of Wilby-Kincey had an understanding with all the defendant distributors, except United Artists, that irrespective of the contract terms, if the results on a percentage picture did not live up to the contract terms there would be negotiations for a reduction of terms (R. 592-594). Wilby-Kincey continued to be the regular customer of many of the defendant distributors during the damage period, not only in Atlanta but in other Wilby-Kincey towns in Tennessee and Alabama (R. 131, 470, 552).

Deals for the Loew's Grand Theatre of the defendant exhibitor Evans for United Artists', Loew's and Universal's product were handled in New York (R. 180, 333-334, 390-392, 665-670). With the exception of the defendant Fox, all changes in run or clearance in the Atlanta exchange area had to be approved by the New York office of the defendant distributor. Likewise, competitive bidding could not be instituted without the approval of the New York office, and if bidding was instituted in a particular situation all decisions on the bids were made in New York (R. 187, 244-245, 302-303, 316-317,462-463).

Petitioners have pointed out in a preceding section of this petition that the national split on Universal product was followed not only in Atlanta but in many of the Wilby-Kincey towns in the Atlanta exchange, and was applicable throughout the country (R. 391-393, 406-407). It has also been pointed out that since 1951 Wilby-Kincey had entered into a split or division of product with practically every competitor in every town in which it operated in the Atlanta exchange (R. 620) and that splits of product to eliminate competition were made with exhibitors taking over theatres divested by United Paramount (American Broadcasting) pursuant to the Paramount decree (R. 535-539, 547-549, 555-556).

In the *Paramount Case* the findings were not based on evidence with regard to every city and town throughout the United States. The Expediting Court heard evidence as to ninety-two cities throughout the nation, and heard somewhat more detailed evidence as to four cities, one of which was Atlanta (D-A p. 39). Appellants here, as has already been pointed out,

have shown the requisite local impact of Paramont Case in Atlanta not only during the damage period, but prior to 1945 when appellants' theatres were actually operating. In view of the Congressional intent in enacting §5, it is submitted that plaintiff in order to show the continuance of that prima facie conspiracy after 1945, need not offer as detailed evidence of national conspiracy as was offered in the Government Case. There certainly is no material variance between the pleading and the proof. *Berger v. United States*, 295 U.S. 78, 81, 83. *Martin v. United States*, 100 F. 2d 490, 495, (C.A. 10).

Nor is there any suggestion of any variance problem in the opinion of this Court in Theatre Enterprises, supra. Nowhere in the charge did the Trial Court charge that plaintiff was required to prove the continuance of the prima facie national conspiracy on a nation-wide basis, and the District Judge's charge is commented upon with approval by this Court. 346 U.S. 537.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

1. There is conflict among the Courts as to the interpretation of this Court's rulings in Theatre Enterprises, supra. The First Circuit has held government decrees inadmissible as a matter of law whenever the private plaintiff's damage period commences after the period covered in the government litigation. See Park Neponset v. Smith, and International Shoe Machine Corp. v. United Shoe, supra. Nevertheless, a number of other courts have cited this Court's opinion in Theatre Enterprises in allowing government

decrees in evidence when the private plaintiff's damage period begins after 1945.

2. The result reached in the presenct case and the rulings which led up to it in conflict with the decision of this Court in the *Paramount Case*, supra, as supplemented by opinions of the Statutory Court. That case documented the conduct of the same defendant distributors in conspiring to dominate and contol the distribution and exhibition of first-run pictures throughout the country, and held that certain conduct — particularly the establishment and adherence to a fixed and arbitrary system of runs and clearance made applicable generally without regard to the particular facts and circumstances of any given stituation — to be violative of the anti-trust laws. The decrees that were entered in that case outlawed that form of business practice and sought to recreate and protect equality of opportunity and freedom of competition in the industry.

The present case, if permitted to stand, illustrates the way in which the same conspirators are able to circumvent the injunctive provisions of the Paramount case and to perpetuate, with the sanction of the Court of Appeals of the Fifth Circuit, the same outlawed business practices which gave defendants the "cream of the business," the lucrative first-runs.

3. Congress and this Court have recognized the difficulty confronting a private plaintiff in any industry attempting to prove conspiracy. The theory of Section 5 as expounded by this Court in the *Emich Motors Case* is that Congress intended to integrate public and private enforcement of the anti-trust laws. Many

private anti-trust actions where the Paramount decrees have been admitted show the impact of the condemned Paramount practices over two or three, or even half a dozen years. Petitioners here shows the impact of the Paramount practices in Atlanta prior to 1945, and their continuance for at least a dozen years thereafter despite the decrees of the Expediting Court. The acts of this case showing the existence of condemned Paramount practices over a period of almost twenty years, despite the holdings of this Court and the Statutory Court, more compellingly than any recorded case dealing with the subject, require the admission of those decrees.

Nevertheless, the Court of Appeals for the Fifth Circuit denied petitioners any benefit from the Government decrees and effectively nullified the Congressional Mandate.

4. There has been a growing tendency of the lower Courts in recent years to restrict and narrow the proof in private treble damage actions. This tendency is evidenced by many decisions including the First Circuit decisions in Park Neponset and International Shoe, supra, and in other actions which have been before this court in the past few years. This perhaps is due to the length of trial time required in Anti-trust action and to the attitude of some courts to the so-called "Bonanza" conferred to plaintiff in that their damages are troubled. However, this attitude of the lower courts is contrary to the Congressional Mandate.

A vast number of the Anti-trust trials dealing with the motion picture industry in which plaintiff has been successful are actions in which the Paramount Decrees and Judgments have been admitted. This is because of the difficulty of the private triple damage plaintiff incurs in prov-

ing conspiracy without the benefit of the Government action. Congress recognized this difficulty by enacting Sec. 5, which gives a plaintiff who has been injured by some of the matters adjudicated in the Government case the benefit of those decrees as prima facie evidence.

If this decision is permitted to stand, it will nullify a cherished Congressional Mandate and will unquestionably limit, if not entirely eliminate a private triple damage action as an effective aid in the enforcement of the Antitrust laws.

For all of the foregoing reasons, therefore, we urge that this Court issue its writ of certiorari in order to review the judgment below.

Respectfully submitted,

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APPENDIX A — STATUTES

Section I of the Sherman Act provides in part (15 U.S.C., Sec. I):

> "Every contract combination in form of Trust or otherwise or conspiracy, in restrain of trade or, among the several states or foreign nations is declared to be illegal. . . ."

Section II of the Sherman Act provides in part (15 U.S.C., Sec. II):

> "Every person who shall monopolize or attempt to ruin or combine or conspire with any othe · person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of misdemeanor. . . ."

Section 4 of the Clayton Act provides (15 U.S.C., Sec. 15):

> "Any person who shall be injured in business or property by reason of anything forbidden in the Anti-trust law may sue therefore in any District Court of the United States in the District in which the defendant resides or is found or has an agent, without respect to the amount in controversy and shall recover threefold of the damages by him sustained and the cost of suit, including a reasonable attorney's fee."

Section 5 of the Clayton Act provides in part (15 U.S.C., Section 16):

> "A final Judgment or Decree hereafter rendered in any Criminal prosecution or in any suit or proceedings in equity brought by or on behalf of the United States under the Anti-trust laws to the effect that a defendant has violated said laws, shall be prima facie evidence against such defendant in any suit or proceedings brought by any other party against defendant under said laws as to all matters respecting which said Judgment or Decree would be an estoppel as between the parties thereof; provided, this section shall not apply to consent Judgments or Decrees entered before any testimony has been taken."

APPENDIX B

OPINION OF COURT

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20019

BUCKHEAD THEATRE COMPANY and GARDEN HILLS THEATRE COMPANY,
Appellants,

versus

ATLANTA ENTERPRISES, INC., ET AL.,
Appellees.

Appeals from the United States District Court for the Northern District of Georgia.

(January 21, 1964.)

Before TUTTLE, Chief Judge, BROWN and BELL, Circuit Judges.

TUTTLE, Chief Judge: The appeals in these two anti-trust suits, consolidated for trial and appeal, present the question whether the trial court erred in excluding the decrees, findings of fact and conclusions of law in *United*

States v. Paramount Pictures, Inc., from the evidence submitted to the jury during the trial. They then raise the subsidiary question whether such exclusion, if error, requires a reversal and new trial as to count one of the complaint.

The complaints below were substantially identical and will be dealt with in this opinion as if they were one suit. Each complaint was in three counts. Count one alleged a national conspiracy on the part of the named distributors of motion picture films, and certain local corporations of the Atlanta distributing area connected with operating theatres in that area, charging various acts that were alleged to restrain and monopolize interstate trade and commerce in motion picture films. Count two alleged substantially the same conspiracy except that it was alleged to be a conspiracy different from and separate from the national conspiracy, and alleged to exist only within the Atlanta area. Count three was directed only at the defendant exhibitors, thus containing no claim against the motion picture distributors. Both complaints were filed in January, 1956. The periods for which damages were recoverable, as alleged in the complaint, commenced January 5, 1952, and ended June 30, 1961.

The defendants denied all of the allegations of conspiracy, and, of course, denied being liable in any damages to the plaintiffs.

When the case came on for pre-trial hearing, it became apparent that one of the important issues on the trial would be whether the final judgment or decree in *United States v. Paramount Pictures, Inc.*, 66 F.Supp. 323 (S.D. N.Y. 1946), aff'd in part and rev'd in part, 334 U.S. 131 (1948), opinion on remand, 85 F.Supp. 881 (S.D. N.Y. 1949), hereinafter referred to as "the Paramount decrees," would be admissible

in evidence on the trial of this case. The plaintiffs below, the appellants here, contended that the final judgment or decree was admissible by virtue of Section 5 of the Clayton Act (15 U.S.C.A. § 16(a)), which provides:

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated certain laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: Provided, This section shall not apply to consent judgments or decrees entered before any testimony has been taken. . . ."

The defendants, the appellees here, contended that under the principles of estoppel by judgment, such judgment or decree should not be admissible in view of the passage of time which, as they contended, would make irrelevant any determination as to the existence of a conspiracy in 1945 to a complaint alleging a conspiracy beginning in 1952.

The trial court dealt with the matter on pre-trial by including the following paragraph in the pre-trial order:

> "Upon the introduction of evidence from which the jury could find that the national conspiracy, as alleged in Count One of the complaint, existed in the Atlanta area during the period there involved and that the practices complained of here and which were condemned in the Paramount decree

were continued to and were practiced by the defendants during the damage period here involved and that these illegal practices had an injurious effect upon plaintiff, his business or property then, and in that event, the plaintiff will be permitted to introduce into evidence the final decrees in the 'Paramount Case' under the provisions of § 5 of the Clayton Act. 15 U.S.C.A., § 16."

On the trial on the merits, appellants offered evidence which they contended tended to show the existence of the conspiracy alleged on a national scale under Count one, a separate conspiracy engaged in locally under Count two, and a limited conspiracy by the local exhibitor-defendants under Count three. Thereupon the plaintiffs offered in evidence the decrees, findings of fact and conclusions of law in the *Paramount* case. The defendants objected and the court sustained the objections and excluded the *Paramount* record. Upon motion the court directed a verdict at the close of plaintiffs' evidence as to Count one, the court stating, "I think it follows the court's ruling with respect to the *Paramount* decree, that the first Count of the complaint would have to go out."

This ruling, of course, was based on the determination by the trial court that absent the *Paramount* decree, there was no evidence to go to the jury that would warrant a finding by it of the existence of a national conspiracy. Counts two and three were submitted to the jury, which found for the defendants on both of the counts. Thereupon judgment was entered by the court for the defendants in each action.

The appeal raises the single issue: the exclusion of the record in the *Paramount* case. Since the appeal did not attack the judgment with respect to those counts submitted

to the jury, and since the defendants below who were not parties to the *Paramount* decree could not, in any event, be bound or be estopped by it, it is plain, to begin with, that the judgment must be affirmed as to Atlanta Enterprises, Inc., Wilby-Kincey Service Corporation and Evans Amusement Corporation. This follows because appellants do not contend that there was sufficient evidence, without the *Paramount* decree being in evidence, to submit the issues of Count one to the jury.

We next come to a consideration of the trial court's treatment of the *Paramount* decree. If it were not for the provisions of Section 5, quoted above, there could be no conceivable basis on which the *Paramount* record would be admissible in the trial of the present lawsuit. *Buckeye Powder Co. v. DuPont Powder Co.*, 248 U.S. 55. The Supreme Court has held in *Emich Motors v. General Motors Corp.*, 340 U.S. 558, that the use which may be made under Section 5 of the prior adjudication is "to be determined by reference to the general doctrine of estoppel." This much, in fact, is made clear from the face of the statute itself. The Supreme Court further held in the *Emich* case that "estoppel extends only to 'questions distinctly put in issue and directly determined'" in the prior proceeding. 340 U.S. 558, 568, 569.

Section 5 could be of great value to a private litigant who, conceiving that he had been hurt by the very conspiracy which the court found to exist in 1945, wished to sue the same defendant distributors for damages which he conceives he was entitled to by reason of that conspiracy. He would be able to succeed in such a suit without independently proving the existence of the national conspiracy which had thus been found to exist. This, undoubtedly, was the reason for the enactment of this provision by the Congress.

Where, however, the plaintiff in a suit who does not complain of the very conspiracy which the court has already found to exist, seeks to recover damages for a similar or like conspiracy occurring at a subsequent date, his right to rely on the decree as prima facie proof of anything in his subsequent litigation rests on much more tenuous grounds. The decree may be admissible only if the establishment of what it decreed or found to exist in 1945 is relevant to the subsequent litigation.

The question is, therefore, is the existence of a conspiracy touching on the method of doing business of the defendant distributors in 1945 relevant to a decision of the issues alleged in the subsequent lawsuit? Ordinarily, of course, the existence in 1945 of a conspiracy is not relevant to an inquiry whether such a conspiracy also exists in 1951. It is the fact of the 1951 conspiracy on which the plaintiffs here must depend if their cause of action is to be sustained.

As a preliminary to considering the legal question here involved, it may be appropriate to comment on the fact that the entire attention of the parties here in the present litigation is directed to what is alleged to amount to an illegal agreement by the distributors and the local exhibitor-defendants to deprive the plaintiffs and others of an opportunity to compete fairly for the product by the maintenance of arbitrary and unreasonable agreed-upon clearances, or other devices restricting the profitable showing of the product of the distributors to those favored few exhibitors alleged to be participants in the conspiracy. The problem of clearances and runs was only one of a number of industrywide practices found to be violative of the anti-trust laws in the *Paramount* case. The court there dealt with allegations and proof that the parties

it found to have engaged in the conspiracy had engaged in illegal price fixing, illegal clearance and run practices, illegal formula deals, master agreements and franchises, the illegal practice of requiring block booking and blind selling, illegal pooling agreements, illegal discrimination among licensee as between affiliated and unaffiliated large circuits of exhibitors, and an undue concentration of power over exhibitors through the ownership by the distributors of large chains of theatres.

It is clear that the trial court there, and the Supreme Court, determined that the illegal method of fixing clearances and runs did constitute a violation of the antitrust statutes. It is also a fact that there was a multiple conspiracy charged and proved in that case as to many factors that are admittedly not now present, even under the contentions of the plaintiffs below in the present litigation. This is a circumstance that must be taken into consideration by any court if it is to have any discretion as to the admission of evidence, which, while having some probative value, may also have extremely prejudicial effect by reason of non-relevant matters that would inevitably be presented to the jury if the evidence were to be admitted.

The language of the Court of Appeals for the Second Circuit in *Monticello Tobacco Co. v. American Tobacco Company*, 2 Cir., 197 F.2d 629, at 632, demonstrates the dangers of permitting in evidence proof having very slight relevance to the case on trial, but having a great potential to create prejudice. Discussing Section 5 of the Clayton Act the Court says:

> "This statute does not authorize the introduction of a prior government decree merely for its aura

of guilt or to imply new wrongdoing from past wrongdoing.'"

Further the Court spoke of the care required on the part of the trial court in exercising discretion in making a decision with respect to this matter, ". . . . A discretion to be carefully exercised in regard to evidence of such light probative value, but potentially high emotive packed on a jury of laymen."

However, we conclude that the sounder basis for approval of the trial court's order is that in the record before it the decrees were simply irrelevant to the issues to be tried. We think the trial court set the proper rule in its order on pre-trial. That is, if the appellants had introduced evidence from which the jury could have found the existence of the national conspiracy — that is the conspiracy alleged in Count one, and that these defendants extended this conspiracy to the Atlanta area during the period involved, and that the practices complained of here and which were condemned in the *Paramount* decree were continued to and were practiced by the defendants during the damage period here involved, and that these illegal practices had an injurious effect upon the plaintiff, then the court should have admitted such part of the final decrees in the *Paramount* case as would be appropriate under the doctrine of estoppel by judgment; otherwise the court should not admit the evidence.

We think there is nothing in our earlier case of *Tivoli Realty Co. v. Paramount Pictures*, 5 Cir., 209 F.2d 41, that requires a different result. We find no decision by the Supreme Court that suggests that the prior decrees may be introduced for the purpose of establishing in and of

themselves the existence of a conspiracy at a later date. Appellants point to *Theatre Enterprises v. Paramount*, 346 U.S. 537, as a case that stands for the proposition that the mere fact that the conspiracy sued for covers a different period from that of the Paramount decrees does not deprive the decree of all probative value. The conspiracy sued on in *Theatre Enterprises* was alleged to have started in February, 1949, whereas the *Paramount* case involved a conspiracy found to exist as of 1945. The Supreme Court there said:

> "Indeed, the relevancy of Paramount to the instant case is slight."

The Court then disposed of the argument of the appellees in that case that the plaintiff was entitled to no benefit at all from the earlier decrees. The Court said:

> "We need not pass on respondents' contention that petitioner was entitled to no benefit at all from the earlier decrees. We merely hold that petitioner was entitled to no greater benefit than the trial judge gave it."

When we consider that the conspiracy here declared upon commenced three years later than that before the Supreme Court in *Theatre Enterprises*, and in view of the absence of any other evidence to support the claims in Court one, we conclude that whatever relevance there may have been in *Theatre Enterprises* would have vanished completely by the time of, and under the circumstances of, the filing of the instant suits.

It is not necessary for us to consider the last argument by appellees in support of the trial court's dismissal

of Count one. This argument is that the very acts which appellants here contend proved the existence of a national conspiracy if linked to the *Paramount* decrees have been expressly rejected by the jury in its finding for the defendant on Counts two and three. We are not convinced that the jury's findings on separate counts need be completely consistent. We simply hold, however, that there being no evidence of a national conspiracy, proof of the *Paramount* decrees would be irrelevant to any issue pending before the trial court.

The court was, therefore, warranted in excluding these decrees from consideration by the jury.

The judgments are AFFIRMED.

BROWN, Circuit Judge, concurring:

I concur in the Court's opinion and the decision. But I would add this by way of emphasis.

As the opinion points out, the proof of the existence of the conspiracy in 1952-1961 depended here entirely on the 1945 conspiracy. Without the *Paramount* decree, the conspiracy was not established, and hence that portion of the *Paramount* decree was clearly irrelevant and not admissible.

But as the opinion points out, the task of the trial Judge may be a delicate one in selecting (or excising) portions of a decree as admissible or not admissible under §5. The Trial Court's pretrial order which we effectually approve required the prior establishment of all elements. I am not sure that on applicable principles of collateral estoppel this is required. Assuming that

there is evidence outside of the decree to show the continuation of some of the same acts as were condemned in the decree, I think such portions of the decree would be admissible if otherwise pertinent to show such fact, and the further legal-fact that such action had been determined to be a violation of the anti-trust statutes. Similarly, if there were other evidence available to show continuation of a conspiracy, I would have much doubt that it would be necessary, as the pretrial order required, to prove that damage was sustained thereby.

What I think warrants emphasis is that it is not a case of all or nothing. There may well be circumstances in which the decree would not be admissible (as here) to prove the element of conspiracy, but at the same time other portions would be admissible to establish other pertinent elements if connected up.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1963

No. 20019

D. C. Docket No. 5479 C. A.

BUCKHEAD THEATRE COMPANY and
GARDEN HILLS THEATRE COMPANY,
Appellants,

versus

ATLANTA ENTERPRISES, INC., ET AL.,
Appellees.

Appeals from the United States District Court for the Northern District of Georgia.

Before TUTTLE, Chief Judge, BROWN and BELL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby affirmed;

It is further ordered and adjudged that the appellants, Buckhead Theatre Company and Garden Hills Theatre Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Brown, Circuit Judge, Concurs Specially"

January 21, 1964

Issued as Mandate: May 8, 1964.

APPENDIX C

ORDER DENYING REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20,019

BUCKHEAD THEATRE COMPANY and GARDEN HILLS THEATRE COMPANY,
Appellants,

versus

ATLANTA ENTERPRISES, INC., et al,
Appellees.

Appeals from the United States District Court for the Northern District of Georgia

(April 30, 1964)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, BROWN and BELL, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

Office-Supreme Court, U.S.
FILED
SEP 28 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 358

BUCKHEAD THEATRE CORPORATION,
Petitioner,

versus

ATLANTA ENTERPRISES, INC., et al,
Respondents.

GARDEN HILLS THEATRE CORPORATION,
Petitioner,

versus

ATLANTA ENTERPRISES, INC., et al,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

	Page
THE QUESTIONS PRESENTED	1
ARGUMENT	
I THE PARAMOUNT DECREES CREATED NO ESTOPPEL IN THESE ACTIONS	
The Paramount Case	3
The Questions In These Actions In Respect of Run and Clearance Were Not Determined in the Paramount Case	4
The Paramount Case Adjudicated Nothing As To The Damage Period In These Actions	6
None Of The Exhibitor Defendants In These Actions Was A Defendant In The Paramount Case	6
II EVEN IF ADMISSIBLE, THE DECREES TOGETHER WITH THE OTHER EVIDENCE DO NOT PERMIT THE SUBMISSION OF COUNT I TO A JURY	8
III PETITIONERS' REASONS FOR THE GRANT OF THE WRIT OF CERTIORARI ARE WITHOUT MERIT	
There Is No Conflict Among The Circuits As To The Interpretation Of This Court's Opinion In Theatre Enterprises	9

Page

The Result Reached In These Actions Does Not Circumvent The Paramount Decrees 12

The Result Reached In These Actions Follows the Mandate Of Congress 13

TABLE OF CASES CITED

Buckhead Theatre Corporation, et al v. Atlanta Enterprises, Inc., et al, 327 F. 2d 365 (5th Cir. 1964) 2, 5

Dipson Theatres, Inc. v. Buffalo Theatres, Inc., 190 F. 2d 951 (2nd Cir. 1951), cert. den. 342 U. S. 926 (1952) 7

Emich Motors v. General Motors Corporation, 340 U. S. 558 (1951) 3

International Shoe Machine Corp. v. United Shoe Machinery Corp., 315 F. 2d 449 (1st Cir. 1963), cert. den. 375 U. S. 820 (1964) 6, 11

Krulewitch v. United States, 336 U. S. 440 (1949) 6, 7

Orbo Theatre Corporation v. Loew's Incorporated, 156 F. Supp. 770 (1957), aff'd 261 F. 2d 280 (1958), cert. den. 359 U. S. 943 (1959) 11

Paramount Film Distributing Corp. v. Village Theatres, Inc., 228 F. 2d 721 (1955) 7, 11

Park Neponset Corporation v. Smith, 258 F. 2d 452 (1st Cir. 1958) 5, 11

CASES CITED (Continued)

Page

Partmar Corp. v. Paramount Theatres Corp., 347 U. S. 89 (1954) 3

Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U. S. 537 (1954) 3, 5, 6, 9

United States v. Paramount Pictures, Inc., et al, 66 F. Supp. 323 (S.D.N.Y. 1946), aff'd in part and rev'd in part, 334 U. S. 131 (1948); opinion on remand, 85 F. Supp. 881 (S.D.N.Y. 1949) 1, 3, 4, 5, 7

Webster Rosewood Corp. v. Schine Chain Theatres, Inc., 263 F. 2d 533 (2nd Cir. 1959) 11

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM 1964

No. 358

BUCKHEAD THEATRE CORPORATION,
Petitioner,

versus

ATLANTA ENTERPRISES, INC., et al,
Respondents.

GARDEN HILLS THEATRE CORPORATION,
Petitioner,

versus

ATLANTA ENTERPRISES, INC., et al,
Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THE QUESTIONS PRESENTED

These actions were brought under the Anti Trust laws. The petition for a writ of certiorari raises the question whether Section 5 of the Clayton Act required the admission into evidence in Count I of each of these actions of portions of the judgments in a prior Government action entitled *United States v. Paramount Pictures, Inc., et al* (hereinafter referred to as "the *Paramount* case"), 66 F. Supp. 323 (S.D.N.Y. 1946), aff'd in part and rev'd in part, 334 U.S. 131 (1948); opinion on remand, 85 F. Supp. 881 (S.D.N.Y. 1949). The trial

court rejected the Paramount judgments and its decision was affirmed by the United States Court of Appeals for the Fifth Circuit. *Buckhead Theatre Corporation, et al v. Atlanta Enterprises, Inc., et al*, 327 F. 2d 365 (5th Cir. 1964).

A second and subsidiary question raised is whether, even if admissible, the *Paramount* judgments together with the other evidence would have been sufficient to warrant submission to the jury of Count I in each action.

Each of the instant suits was filed in three Counts. Count I alleged a nationwide conspiracy. Count II alleged a local conspiracy "other than and different from" the national conspiracy, but the same conduct is alleged in support of each conspiracy. Count III alleged a theatre monopoly. The trial court directed a verdict for respondents on Count I. Counts II and III were submitted to the jury, which returned a verdict for respondents. The petition for certiorari pertains only to Count I.

The basic question here raised is simply this: Did the *Paramount* judgments create an estoppel in these actions? Respondents will show that because of the difference in issues, time periods, and in parties, the *Paramount* case did not create an estoppel here.

Respondents will show, in addition, that even if admissible, the *Paramount* judgments with the other evidence could not establish a nationwide conspiracy during the damage period in these actions, and thus could not require the submission of Count I to the jury.

Respondents will show, finally, that there is no conflict among the circuit courts which have interpreted this Court's decision in *Theatre Enterprise, Inc. v. Paramount Film Distributing Corporation*, 346 U. S. 537, 543 (1954), as it relates to the basic question here raised, and that none of the reasons advanced by petitioners in support of their petition has any merit whatsoever.

ARGUMENT

I

THE PARAMOUNT DECREES CREATED NO ESTOPPEL IN THESE ACTIONS.

This Court has made it clear that the evidentiary use which may be made under Section 5 of a prior Government judgment is "to be determined by reference to the general doctrine of estoppel" and that such "estoppel extends only to 'questions distinctly put in issue and directly determined' in" the prior proceeding. *Emich Motors v. General Motors Corporation*, 340 U. S. 558, 568, 569 (1951). See also *Partmar Corp. v. Paramount Theatres Corp.*, 347 U.S. 89, 102 (1954).

The Paramount Case

In *United States v. Paramount Pictures, Inc.*, (supra), the Government sued the eight major motion picture companies and the theatre-operating affiliates of five of them. The suit, instituted in 1938, came to trial in 1945. The evidence related to 1945 and prior years. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corporation*, 346 U. S. 537, 543 (1954). The District Court

agreed with the Government that the defendants had conspired on a national basis to restrain trade through the commission of various illegal practices (66 F. Supp. 323).

In 1946 the defendants were enjoined from further commission of practices held to be illegal (70 F. Supp. 53, 72). On May 3, 1948, this Court substantially affirmed the District Court's judgment, remanding for reconsideration of the relief to be granted (334 U. S. 131). Subsequent proceedings left undisturbed the portions of the judgment of the District Court relative to runs and clearances, upon which petitioners here rely. (See *United States v. Paramount*, 85 F. Supp. 881, 897.)

The Questions In These Actions In Respect Of Run And Clearance Were Not Determined In The Paramount Case.

The District Court in the *Paramount* case found that the defendants were guilty of "conspiring with each other to maintain a nationwide system of runs and clearances which is substantially uniform in each local competitive area." (70 F. Supp. 53 at 72) and enjoined them from agreeing "to maintain a system of clearances. . . ." (70 F. Supp. 53 at 73). There was no adjudication, however, that any particular local system of runs and clearances was illegal. The District Court clearly indicated that local issues in respect of runs and clearances were not being adjudicated:

> ". . . The decision of such controversies as may arise over clearances should be left to local suits in the area concerned. . . ." *United States v. Paramount*, 66 F. Supp. 323, 342.

In respect of possible discrimination as to admission prices or clearances the District Court said, at 66 F. Supp. 323, 353:

> ". . . They have perhaps done so, but we are without sufficient knowledge of the many factors entering into the determination of these provisions such as the character of specific communities, the nature of the different theatre appointments, of the patrons, operating policies, locations, and responsibility of operators. . . ."

Thus, in the absence of evidence as to the character of specific communities, theatres, theatre operators, and theatre patronage, the Court felt that it could not pass upon the legality of the runs and clearances in specific localities.

As the Fifth Circuit Court noted (*Buckhead Theatre Company, et al v. Atlanta Enterprises, Inc., et al*, 327 F. 2d 365, 368), the crux of the charge against respondents here is the alleged continuation into the damage period in these actions (1952-1961) of the Atlanta system of runs and clearances, claimed to have been adjudicated illegal in the *Paramount* case. But the Paramount case adjudicated nothing in respect of Atlanta runs and clearances, and that portion of the decree relative to runs and clearances creates no estoppel here. See *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U. S. 537, 543 (1954); *Park Neponset Corporation v. Smith*, 258 F. 2d 452, 456 (1st Cir. 1958).

The Paramount Case Adjudicated Nothing As To The Damage Period In These Actions.

The adjudication in the *Paramount* case relates to 1945 and prior years. Petitioners here seek damages alleged to have been incurred during 1952-1961. Due to the difference in time periods, no estoppel can be created. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U. S. 537 (1954); *International Shoe Machine Corp. v. United Shoe Machinery Corp.*, 315 F. 2d 449 (1st Cir. 1963), cert. den. 375 U. S. 820 (1964), and cases cited at 315 F. 2d 449, 455-456.

Where the *precise* matters of which a private plaintiff complains were distinctly put in issue and directly determined in the Government action, then the prior judgment or decree is admissible as an estoppel for the period of time there involved, since the doctrine of estoppel is satisfied. Such is not the case here. Petitioners' complaint of denial of first run or a reduced clearance during 1952-1961 certainly was not distinctly put in issue and directly determined in the *Paramount* case, which related to facts as of 1945.

None Of The Exhibitor Defendants In These Actions Was A Defendant In The Paramount Case.

Where some of the defendants in the subsequent private suit were parties to the Government suit and some were not, a situation is presented where admission of the decrees even with instructions limiting them to defendants who were in the Government suit may be reversible error. As a practical matter, no instruction can cure the prejudice done to those defendants against whom the decrees are not admissible. See *Krulewitch*

v. United States, 336 U. S. 440, 453 (1949) (Concurring opinion).

In *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.* 190 F. 2d 951, 958 (2nd Cir. 1951), cert. den. 342 U. S. 926 (1952), the court relied upon the differences in parties to the two actions in holding that the *Paramount* decrees were inadmissible, stating:

> "The fact that plaintiff now concedes that Columbia and Universal were not parties to the present conspiracy and concededly Shea and McFaul were not parties to the original Paramount action also indicates that that case is not controlling here."

The Tenth Circuit, in *Paramount Film Distributing Corp. v. Village Theatres, Inc.*, 228 F. 2d 721, 726-727 (1955), (supra), reversed a jury verdict for the plaintiff because one of the *Paramount* decrees was admitted and the later suit involved different parties defendant and different time periods than those with which *United States v. Paramount*, (supra), was concerned.

The foregoing comparison of certain aspects of the *Paramount* case with these actions shows that no matter which arose here was directly determined in *United States v. Paramount*, (supra). Therefore, no estoppel arises which permits the introduction of the *Paramount* decrees into evidence in these cases.

II

EVEN IF ADMISSIBLE, THE DECREES TOGETHER WITH THE OTHER EVIDENCE DO NOT PERMIT THE SUBMISSION OF COUNT I TO A JURY.

The trial court directed a verdict for the defendants on Count I. The petitioners here contend that the other evidence plus the decrees would have been sufficient to make a jury case as to Count I.

Except for the *Paramount* decrees, there was no significant item of evidence offered by petitioners which was rejected by the trial court. Nevertheless, there was no evidence to establish the existence of a nationwide conspiracy during the damage period. Significantly, the Government in the *Paramount* case heard evidence as to ninety two cities and found evidence of nationwide common design through control of theatres by the five "major" defendants. In the instant cases, the only comprehensive proof pertained to the Atlanta situation, and evidence as to nationwide common design is entirely lacking.

The petitioners, in fact, rely on the *Paramount* decrees to establish the alleged national conspiracy. This was recognized by the trial judge who indicated that he felt that whether Count I could go to the jury depended on the admissibility of the decrees. Even so, the decrees are offered solely for the purpose of proving a national conspiracy as of 1945. Thus, even with the decrees in evidence, petitioners would be required to prove a national conspiracy which had an impact on petitioners during 1952-1961. Since the decrees are no evidence of such a conspiracy, they would not require the submission of Count I to the jury.

III

PETITIONERS' REASONS FOR THE GRANT OF THE WRIT OF CERTIORARI ARE WITHOUT MERIT.

There Is No Conflict Among The Circuits As To The Interpretation Of This Court's Opinion In Theatre Enterprises.

Petitioners contend that various courts have advanced differing interpretations of this Court's opinion in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U. S. 537 (1954). There is no conflict among the circuits which have considered the matter.

In *Theatre Enterprises* the plaintiff had charged a nationwide conspiracy as to runs and clearances and the carrying out of that conspiracy by licensing pictures for first run exhibition in Baltimore to theatres located downtown, some of which were affiliated with the defendant distributors, and refusing to license pictures for first run exhibition to plaintiff's neighborhood Crest Theatre. That theatre opened and the damage period commenced in 1949.

As in the instant cases, the crux of that case was a claimed conspiracy to deny first run (there in Baltimore — here in Atlanta) to plaintiff. In *Theatre Enterprises* at the conclusion of the evidence, and just before all parties rested, the trial judge admitted selected excerpts from the decrees and nothing else. The Court then charged the jury as to their effect. Both plaintiff and defendants took exceptions.

The jury found for the defendants. On appeal plaintiff urged, among other things, that the trial court had erred in circumscribing its use of the *Paramount* decrees. Defendants, on the other hand, urged that the decrees were not admissible at all and, in any event, that the handling of the decrees by the trial court was more than plaintiff was entitled to receive.

It was in this context that this Court said that it did not agree with petitioner's contention that the handling of the decrees was so superficial as to deprive it of the benefits conferred by Section 5. The Court decided only the narrower question presented and merely held "that petitioner was entitled to no greater benefit than the trial judge gave it," stating at 346 U. S. 537, 543:

> ". . . The trial judge instructed, in effect, that the Paramount decrees alone could not support a recovery by petitioner; additional evidence was required to relate the presumed *Paramount* conspiracy to Baltimore and to the claimed damage period. . . . The Paramount Case involved a conspiracy found to exist as of 1945, which was enjoined no later than June 25, 1948; but the conspiracy alleged here involves a claimed damage period running from February 1949 to March 1950. Indeed the relevancy of *Paramount* to the instant case is slight. We need not pass on respondents' contention that petitioner was entitled to no benefit at all from the earlier decrees. We merely hold that petitioner was entitled to no greater benefit than the trial judge gave it."

It thus appears that this Court would have held the *Paramount* decrees to have been improperly admitted if resolution of that question had been necessary to its decision. Otherwise, it would not have said "Indeed the relevancy of *Paramount* to the instant case is slight."

Since *Theatre Enterprises*, (supra), the First Circuit in *International Shoe Machine Corp. v. United Shoe Machinery Corp.*, 315 F. 2d 449 (1963), cert. den. 375 U. S. 820 (1964), and *Park Neponset Corporation v. Smith*, 258 F. 2d 452 (1958), has held prior government decrees inadmissible under the principles of Section 5 of the Clayton Act where the damage period in the subsequent private action has commenced subsequent to the period as to which the prior government decree found a conspiracy to exist.

The Second Circuit in *Webster Rosewood Corp. v. Schine Chain Theatres, Inc.*, 263 F. 2d 533 (2nd Cir. 1959), cert. den. 360 U. S. 912 (1959), dealt with the question whether the plaintiff had been prejudiced by the limiting effect given a prior Government decree by the trial judge, who tried the case without a jury. The Second Circuit Court merely held, as did this Court in *Theatre Enterprises*, (supra), that the plaintiff was entitled to no more than what he had received in respect of the prior Government decree.

The Tenth Circuit in *Paramount Film Distributing Corp. v. Village Theatre*, 228 F. 2d 721 (10th Cir. 1955), and the District of Columbia Circuit in *Orbo Theatre Corporation v. Loew's Incorporated*, 156 F. Supp. 770 (1957), aff'd 261 F. 2d 280 (1958), cert. den. 359 U. S. 943 (1959), both held prior government decrees inadmissible in a suit where the conspiracy was alleged to have

commenced subsequent to the time period with which the previous Government suit was concerned.

The Fifth Circuit in these actions stated at 327 F. 2d 365, 369:

> "When we consider that the conspiracy here declared upon commenced three years later than that before the Supreme Court in *Theatre Enterprises*, and in view of the absence of any other evidence to support the claims in Count one, we conclude that whatever relevance there may have been in *Theatre Enterprises* would have vanished completely by the time of, and under the circumstances of, the filing of the instant suits."

Certainly none of the holdings just discussed conflicts with *Theatre Enterprises* nor do the holdings conflict among themselves. We know of no other circuit courts which have decided this particular matter nor has any been called to our attention.

The Result Reached In These Actions Does Not Circumvent The Paramount Decrees.

Petitioners argue that the method of distribution of feature films in Atlanta in 1945, whereby distributors licensed first run Atlanta showings in larger downtown theatres followed by subsequent showings in neighborhood theatres after periods of clearance, was enjoined by the *Paramount* case but was nevertheless continued through the damage period in these actions in disregard of the *Paramount* decrees. As we have in-

dicated, however, there was no adjudication in the *Paramount* case that the system of runs and clearances in effect in Atlanta in 1945 was invalid. Even had there been such an adjudication, the clearances in effect in 1945 were drastically different from those in effect during 1952-1961 (R. 125, 126, 193, 319, 480, 481). Nor was there an adjudication that it was unlawful for a distributor to license the first run of a motion picture in a large downtown theatre where possible.

Petitioners' complaint that the system of runs and clearances in effect in Atlanta during 1952-1961 violated the anti-trust laws was submitted to the jury in Count II in these cases alleging a local conspiracy. Except for the decrees, petitioners offered the same evidence as to both counts and all was received by the trial court. The jury finding for Respondents in Count II (as to which petitioners do not claim the decrees were admissible) has affirmatively established the validity of the Atlanta system of runs and clearances in 1952-1961.

The Result Reached In These Actions Follows The Mandate Of Congress.

Petitioners' final argument is that Congress in Section 5 of the Clayton Act meant to reduce an anti-trust plaintiff's burden of proving a conspiracy in restraint of trade in instances where such a conspiracy which had damaged that plaintiff had already been proven by the Government and that courts must bear in mind the Congressional directive when applying Section 5. To assist the plaintiff and, at the same time, prevent the haphazard misuse of prior Government decrees, Congress in Section 5 made the admissibility of such decrees

specifically subject to the requirements of estoppel. Those requirements were simply not met in these actions, and the trial court had no choice but to reject the decrees.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

_____

Robert S. Sams

_____

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CERTIFICATE OF SERVICE

I, ROBERT S. SAMS, of counsel for respondents, do hereby certify that I have served a copy of the foregoing Response to the Petition for Certiorari on petitioners' counsel by depositing same in the United States mail, with Air Mail postage prepaid, addressed to each of petitioners' counsel of record at his post office address.

This —— day of September, 1964.

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IN THE

Supreme Court of the United States

OCTOBER TERM

No. 358

BUCKHEAD THEATRE CORPORATION, et al.,
Petitioners,

versus

ATLANTA ENTERPRISES, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INDEX

Page

1. Portions of Paramount decrees dealing with run and clearance are admissible in subsequent private suit 1

2. The Paramount decrees are admissible in a subsequent private suit against those parties who were parties to the prior Government action 3

3. The Paramount decrees together with the evidence before the jury warranted submission of Count 1 to the jury 4

4. There is a conflict among the circuits as to the interpretation of this Court's opinion in *Theatre Enterprises* 8

5. The result reached in the instant cases, and the rulings which led up to it, are in conflict with the decisions of this court and the statutory court in the Paramount Case 12

TABLE OF CASES CITED

Basle Theatres, Inc. v. Warner Bros. Pictures Distributing Corporation (N.D. Pa.) 168 F. Supp. 553 ..... 3, 12

Bausch Machine Tool Co. v. Aluminum Co. of America, 72 F. 2d. 236 (C.A. 2) 1934, cert. denied 293, U.S. 589 14

Berger v. United States, 295 U.S. 78 6

Columbia Pictures Corp. v. Rubinstein: 1961 C.C.H. Trade Cases (C.A. 8 1961) 2, 4

Dipson Theatres, Inc. v. Buffalo Theatres, Inc., 190 F. 2d 951, 958 (2nd Cir. 1951) ..... 4.

TABLE OF CASES (Continued)

Page

Don George, Inc. v. Paramount Pictures, Inc. (D.C. La.) 111 F. Supp. 458 — 5

Eagle Lion Studios v. Loew's, Inc. (C.A. 2, 1957) 248 F. 2d. 438; aff'd by divided court, without opinion, 358, U.S. 102. 3 L.ed. 2d 47 — 10

Homewood Theatre v. Loew's, Inc. 110 F. Supp. 398 — 2, 4

International Shoe Machine Corp. v. United States Shoe Machinery Corp. F. 2d. (first cir. 1963) — 8

Interstate Circuits, Inc., et al. v. Tivoli Realty Co. (N.D. Texas, Dallas Division, 1947) 75 F. Supp. 93 — 11

Loew's, Inc. v. Cinema Amusements, Inc. (C.A. 10) 210 F. 2d. 86 — 5

Martin v. United States, 100 F. 2d. 490 (C.A. 10) — 7

New Amusements v. Knoxtenn Theatres, Inc., (E.D. Tenn. N.D.) Appellants' Brief, Appendix IV p. 143 — 3, 4, 12

Orbo Theatre Corp. v. Loew's, 156 F. Supp. 770 (D.C. 1957) — 7

Paramount Film Distributing Corp. v. Village Theatre, 228 F. 2d. 721 (10th Cir. 1955) — 4, 7

Park Neponset v. Smith (C.A. 1) 258 F. 2d. 452 (Fifth Circuit 1958) — 8

Sablosky v. Paramount Film Distributing Corp'n E.D. Pa. (137) F. Supp. 929 — 3

TABLE OF CASES (Continued)

Page

Sun Theatre Corp. v. RKO Radio Pictures, Inc. (C.A. 7) 213 F. 2d. 284 5

Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, aff'g (C.A. 4) 201 F. 2d. 306 ..... 3, 8

Tivoli Realty, Inc. v. Paramount Pictures, Inc. 209 F. 2d. 41 (Fifth Circuit 1954) 2, 3

Twentieth Century Fox Film Corporation v. Brookside Theatre Corp. (C.A. 8) 194 F. 2d. 846 cert. 2

United States v. Schine, 334 U.S. 117, 130 8

Webster Rosewood Corp'n v. Schine Chain Theatres, Inc. 263 F. 2d. 533 (2nd Cir. 1959) 4, 8

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On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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1. Portions of Paramount Decrees Dealing with Run and Clearance Are Admissible In Subsequent Private Suit.

The respondents argue on pages 4 and 5 of their response brief that since the Paramount case adjudicated nothing in respect to Atlanta runs and clearances, that portions of the Paramount decree relative to runs and clearances are not admissible in the instant cases. This argument is contrary to both logic and to the reported authorities. According to the theory of the respondents the portions of the Paramount decrees

relative to run and clearance could be admissible in no private anti-trust action under any circumstances, since there was no adjudication in *Paramount* that any particular local system of runs and clearances was illegal.

However, the District Court in the Paramount Case found that those defendants were guilty of conspiring with each other to maintain a nationwide system of runs and clearances which was substantially uniform in each local competitive area. (70 F. Supp. 53, 72) The authorities are clear that when the impact in a particular area of that nationwide system of runs and clearances is shown by a treble damage plaintiff, then the relevant portions of the decrees become admissible in evidence as to the Paramount Case defendants. The following are some of the cases in which the decrees in their entirety or the portions dealing with run or clearance, have been admitted in evidence upon showing of impact in the local competitive area of the system of runs and clearances condemned in the Paramount Case.

Tivoli Realty, Inc. v. Paramount Pictures, Inc. (C.A. 5) 209 F. 2d 41 [Dallas, Texas]

Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp. (C.A. 8) 194 F. 2d 846, cert. den. 1952 [Kansas City, Missouri].

Loew's, Inc. v. Cinema Amusements, Inc. (C.A. 10) 210 F. 2d 86 [Denver, Colorado].

Homewood Theatre v. Loew's, Inc. (D. Minn.) 10 F. Supp. 398.

Columbia Pictures Corp. v. Rubenstein, Inc. (C.A. 8, 1961) 1961 CCH Trade Cases, [Minneapolis, Minnesota].

Theatre Enterprises, Inc. v. Paramount Film Distributing Corp. 346 U.S. 537 aff'd (C.A. 4) 201 F. 2d 306 [Baltimore, Maryland].

Sablosky v. Paramount Film Distributing Corp'n (E. D. Pa. 137 F. Supp. 929, 934-6) [Norristown, Pennsylvania].

Basle Theatres, Inc. v. Warner Bros. Pictures Distr. Corp'n. (W.D. Pa.) 168 F. Supp. 553, 559 [Pittsburg, Pennsylvania].

New Amusements v. Knoxtenn Theatres, Inc. (E. D. Tenn. N.D.), [Knoxville, Tennessee].

2. The Paramount Decrees Are Admissible In A Subsequent Private Suit Against Those Parties Who Were Parties To The Prior Government Action.

Respondents argue on page 6 of their response brief that since the exhibitor respondents in these actions were not parties to the Government suit it may be reversible error to admit the decrees in evidence as to these distributor respondents that were parties to the Government suit. However, petitioners have not contended that the Paramount decrees were admissible against the exhibitor-respondents, but only against the distributor respondents. The decrees were offered only against eight distributor respondents who were parties to the Paramount Case. However, in *Tivoli Realty, Inc. v. Paramount Pictures, Inc.* (C.A. 5, 1954) 209 F. 2d. 41 the Fifth Circuit held that the Paramount decrees should have been admitted as to the same 8 distributors who are respondents in these actions, although in the *Tivoli Case* there were two exhibitor defendants, Interstate Circuit, Inc. and Texas Consolidated Theatres, Inc. The following are some other actions in which the

Paramount decrees have been admitted in evidence against distributors who were defendants in the Paramount Case, although there were one or more exhibitor defendants were parties, who had not been parties to the *Paramount Case*: *Columbia Pictures Corp. v. Rubenstein* 1961 C.C.H. Trade Cases. (C.A. 8, 1961); *Homewood Theatre v. Loew's Inc.*, 110 F. Supp. 398; *New Amusements v. Knoxtenn Theatres, Inc.* (E.D. Tenn. N.D.).

Paramount Film Distributing Corp. v. Village Theatre, Inc. 228 F. 2d 721, cited by respondents on page 7 of their response brief, has no bearing here. The complaint in that action did not allege the general conspiracy of Paramount with other distributors to do anything condemned in the Paramount Case, but merely charged a conspiracy between Paramount and United Paramount Theatres and a wholly-owned theatre operating subsidiary. In *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.*, (C.A. 2, 1951) 190 F. 2d 951, cert. den. 342 U.S. 926 1952, cited in respondents response brief, the distributors Columbia and Universal were not parties to the conspiracy alleged, and there was a divergence of conduct on the part of some of the remaining distributors that were defendants.

3. The Paramount Decrees Together With the Evidence Before the Jury Warranted Submission of Count I to the Jury.

Respondents argue on page 8 of their response that even with the decrees in evidence, Count I could not be submitted to the jury, because petitioners had not established a national conspiracy during 1952-61 with evidence independent of the decrees. In *Webster Rose-*

wood, supra, the Second Circuit pointed out that with the Government findings admitted, plaintiff had the burden of showing the continuance of the conspiracy into plaintiff's damage period. Here, petitioners had the same burden.

The Paramount decrees are even admissible in evidence where a plaintiff has alleged damage solely from a local conspiracy in the vicinity of its theatre. *Don George, Inc.* v. *Paramount Pictures, Inc.* (D.C. La.) 111 F. Supp. 458, 468-69. *Loew's Inc.* v. *Cinema Amusements, Inc.* (C.A. 10) 210 F. 2d. 86. *Sun Theatre Corp.* v. *RKO Radio Pictures, Inc.* (C.A. 7) 213 F. 2d. 284. In the instant cases, however, petitioners could not offer the Paramount decrees and judgments on Count 2, because each complaint alleged in Count 2 a local conspiracy "other than and different from the national conspiracy alleged in the first count" of the complaint (R. 48, 1207).

Neither the Trial Court nor the Fifth Circuit decided whether the Paramount decrees together with the evidence before the jury warranted submission of Count 1 to the jury. However, the language of the Trial Court, indicates that the granting of the motion for directed verdict as to Count 1 was a consequence of the exclusion of the Paramount decrees and judgments. The Trial Court stated:

> "Well, I think it follows the court's ruling with respect to the Paramount decree, that the first count of the complaint would have to go out.
>
> "Now, the Court will dismiss the first count

> of the complaint, but will overrule the motions with respect to the second and third counts of the complaint." (R. 1145)

In the Paramount Case the findings were not based on evidence with regard to every city and town throughout the United States. The Expediting Court heard evidence as to ninety-two cities throughout the nation, and heard somewhat more detailed evidence as to four cities, one of which was Atlanta. Petitioners here, as has already been pointed out, have shown the requisite impact of the Paramount Case in Atlanta not only during the damage period, but prior to 1945 when petitioners' theatres were actually operating. In view of the Congressional intent in enacting Section 5, it is submitted that plaintiff in order to show the continuance of the prima facie conspiracy after 1945, need not offer as detailed evidence of national conspiracy as was offered in the Government case. In none of the reported cases where the decrees have been admitted, did plaintiff offer detailed proof of conspiracy on a national basis. The Petition for Certiorari (pages 31-35) outlines evidence of the continuance of the Paramount conspiracy in the City of Atlanta, the Atlanta exchange area (Georgia, Tennessee and Alabama and elsewhere, after 1945 and during the damage period.) There is certainly no material variance between the pleading and the proof.

In *Berger* v. *United States*, 295 U.S. 78, at 83, this Court stated:

> "In *Washington & G. R. Co.* v. *Hickey*, 166 U.S. 521, 531, 41 L. ed. 1101, 1104, 17 S. Ct. 661, this court said that 'no variance ought ever

> to be regarded as material where the allegation and proof substantially correspond, or where the variance was not of a character which could have misled the defendant at the trial.' This was said in a civil case, it is true, but it applied equally to a criminal case if there be added the further requisite that the variance be not such as to deprive the accused of his right to be protected against another prosecution for the same offense [Cases Cited]."

See also *Martin v. United States*, 100 F. 2d. 490, at 496 (C.A. 10).

On page 12 of their response, respondents point out that the Fifth Circuit stated that in these actions the conspiracy declared upon commenced three years later than that before the Supreme Court in *Theatre Enterprises*, 327 F. 2d. 365, 369. However, the Fifth Circuit apparently confused the commencement of petitioners' damage period, with the commencement of the conspiracy declared upon by petitioners. The record is clear that in the instant cases petitioners each alleged a conspiracy commencing period to 1935 (R. 42, 1200), and that the Trial Court, in fact, allowed evidence going back to the early 1940's.

For that same reason *Paramount Film Distributing Corp. v. Village Theatre*, 228 F. 2d. 721 (C.A 10, 1955), and *Orbo Theatre Corporation v. Loew's Incorporated*, 156 F. Supp. 770 (1957), aff'd. 261 F. 2d. 280 (1958), cert. den. 359 U.S. 943 (1959), cited in respondents' response on pages 11 and 12, are not applicable here, since in both those actions the conspira-

cy declared on was alleged to have commenced subsequent to the time period with which the Paramount Case was concerned.

4. There Is A Conflict Among The Circuits As To The Interpretation of this Court's Opinion in Theatre Enterprises.

Respondents contend that there is no conflict among the circuits as to the interpretation of this Court's opinion in *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954). However, the decision of the Second Circuit in *Webster Rosewood Corp.* v. *Schine Chain Theatres, Inc.*, 263 Fed. 2d. 533 (C.A. 2, 1959), cert. den, 360 U.S. 912, 1959 conflicts squarely with the decisions of the first circuit in *International Shoe Machine Corp.* v. *United Shoe Machinery Corp.*, 315 F. 2d. 449 (1963), cert. den. 375 U.S. 820 (1964), and *Park Neponset Corporation* v. *Smith*, 258 F. 2d. 452 (1958). In the *International Shoe Machine Corp.* and *Park Neponset* cases, supra, the First Circuit held prior Government decrees inadmissible as a matter of law where the damage period in the subsequent private action commenced subsequent to the period during which the government decree found a conspiracy to exist. The Second Circuit's ruling in *Webster Rosewood*, supra is squarely contrary. In that action plaintiff operated a theatre in Rochester, New York beginning June 20, 1942 and claimed that by conspiracy it was deprived of a first neighborhood run. It offered in evidence a finding by Judge Knight in *United States v. Schine* (See 334 U.S. 117, 130) made as of May 19, 1942. In admitting the findings the District Court declared:

> "It seems impossible in the mass of cases brought by the government to curb monopoly to itemize every business entity that did suffer from such unlawful monopoly. If such particularization were necessary for the provisions of section 5 to operate, then the benefits intended by that section would be definitely curtailed by such reasoning. However, the better reasoning seems clear that such decrees are allowed as prima facie evidence of a general conspiracy with a necessary relation shown to all the local area and the particular business interest alleged to be harmed by the impact of the broad unlawful monopoly. *Emich v. General Motors, supra; Deluxe Theatre Corp. v. Balaban & Katz Corp.*, D. C. 95 F. Supp. 986.

The District Judge, however, found for the defendants on all the evidence. The Second Circuit in approving the District Court's interpretation of the statute, cited this Court's holding in *Theatre Enterprises*, supra:

> "Judge Foley held that this finding limited the 'prima facie estoppel' of the judgment of the Supreme Court under 16 of Title 15 U.S.C.A. to the period before May 19, 1942, and therefore to a period before the beginning of that for which the plaintiff demanded damages. There can be no doubt that this was a proper interpretation of the statute (Theatre Enterprises v. Paramount Film, etc. Co., 346 U.S. 537, 541, 543)."

Webster Rosewood Corp. v. Schine Chain

Theatres, Inc. (C.A. 2, 1959) 263 F. 2d. 533, 535.

In *Eagle Lion Studios v. Loew's, Inc.* (C.A. 2, 1957), 248 F. 2d. 438; aff'd by divided Court, without opinion, 358 U.S. 102, 3 L. Ed. 2d. 47, the Second Circuit affirmed the exclusion of *Paramount Case* findings by the District Court. Although the damage period of plaintiffs, who were independent distributors, commenced after 1945, the Second Circuit did not even discuss this as a grounds for exclusion of the Paramount findings. In affirming the exclusion of the Paramount findings by the District Court, the Second Circuit held that the Paramount Case did not address itself to the issue of whether the defendants Loew's, Inc., RKO Theatres, Inc. and RKO Film Booking Corp. had conspired to exclude the plaintiffs, who were independent distributors, from the opportunity of licensing their pictures on a competitive basis to the theatres of the defendant exhibitors in Metropolitan New York. Chief Judge Clark in a dissenting opinion, which except for the death of Judge Frank would have been the majority opinion, in stating that the Paramount findings should have been admitted stated: "*Paramount* findings pertain to the year 1945, but the plaintiffs showed by quite adequate evidence that the same conditions continued in the period 1946 through 1950."

The respondents contend that this Court would have held Paramount decrees to have been improperly admitted if resolution of that question had been necessary to the decision in *Theatre Enterprises*, supra, and that otherwise, it would not have said, "Indeed the relevancy of Paramount to the instant case is

slight." (Response to petition, page 11.) This assumption is groundless. This Court did not state in *Theatre Enterprises* that the relevance of Paramount to that action was slight because of the passage of time after 1945. The relevance of *Paramount* to the instant cases is not determined merely by the passage of time, but by the extent to which petitioners were affected by condemned Paramount acts and practices. Petitioner has pointed out on pages 30-31 of its petition for certiorari a number of the circumstances in Baltimore which made the relevance of the Paramount Case slight in *Theatre Enterprises*.

In 1954 the Fifth Circuit reached a different result than its decision in the instant cases, holding that the Paramount decrees were admissible in an action where plaintiff commenced operation of its theatre after the period covered by the *Paramount Case*. In *Tivoli Realty, Inc.* v. *Paramount Pictures, Inc.* (C.A. 5, 1954) 209 F. 2d. 41, the Fifth Circuit held that the Trial Court had committed prejudicial error in excluding the Paramount decrees and judgments. The Court's opinion does not indicate when the plaintiff's damage period commenced, but it appears in an earlier proceeding in the same case that plaintiff commenced to operate its theatre on September 26, 1947, after the period covered by the *Paramount Case*. *Interstate Circuit, Inc. et al* v. *Tivoli Realty Co.* (N.D. Texas, Dallas division, 1947) 75 F. Supp. 93. Although that decision was prior to this Court's ruling in *Theatre Enterprises*, supra, it cited the decision of the Fourth Circuit in *Theatre Enterprises*, supra, as authority for the admission of the Paramount decrees.

Contrary to the assertion of the respondents, the

Second Circuit in *Webster Rosewood*, supra, cited *Theatre Enterprises* as authority for admitting Government decrees in evidence where plaintiff commenced operation of its theatre after the period covered by the Government litigation. A number of District Courts have also cited Theatre Enterprises as authority for admitting the Paramount decrees, or portions thereof, in evidence where plaintiff's damage period commenced after 1945. *Basle Theatres, Inc. v. Warner Bros. Pictures Distributing Corp.* (N.D. Pa.) 168 F. Supp. 553, 559. *New Amusements v. Knoxtenn Theatres, Inc.* (E.D. Tenn. 1960).

5. The Result Reached in The Instant Cases, And the Rulings Which Led Up To It, Are In Conflict With The Decisions of This Court and the Statutory Court in the Paramount Case.

Unquestionably there was in existence in the City of Atlanta up to 1945 a local counterpart of the national conspiracy condemned in the Paramount Case (Petition for Certiorari, pages 14-16). Respondent's Response does not appear to deny this. At that time petitioners theatres were in operation and playing on subsequent run. The evidence shows the continuance of this conspiracy with its uniform structure of runs and clearance, its split of first run product between the defendant exhibitors, and its exclusion of independent exhibitors, including petitioners, from the first-run field, after 1945 and during the damage period (Petition for Certiorari, page 17-26). The affiliation of the defendant exhibitors Wilby-Service corporation and Atlanta Enterprises, Inc. with Paramount Pictures, Inc. continued up to 1950, and after 1950 those exhibitors became affiliated with American

Broadcasting-Paramount Pictures, Inc., the largest circuit operator in the country. Evans Amusement Corporation continued to be affiliated with the defendant Loew's, Inc. up to 1959. The respondent distributors continued to serve their product to the same downtown theatres of these defendant exhibitors after 1945 and during the damage period, and would not even negotiate or discuss terms for first-run product with defendant exhibitors including petitioners. Respondents point out in their response that the 1945 clearances were reduced during 1952-1961 (response brief, page 13). However, the clearances continued to be uniform during the damage period, and continued to exclude petitioners and other independent exhibitors from the first-run field monopolized by the defendant exhibitors (See petition, pages 17-26). In this regard it is significant to note that the Trial Court allowed Count 2 of each petitioner's complaint which charged a local conspiracy, to go to the jury.

Respondents point out that, except for the Paramount decrees, petitioners offered the same evidence on Count 2 of the complaint, as they offered on Count 1, and state that the jury finding for the defendants on Count 2 affirmatively established the validity of the Atlanta runs and clearances from 1952-61 (Respondent's Response to Petition, p. 13). The Fifth Circuit in its opinion, stated in this regard that they were "... not convinced that the jury's finding's on separate counts need be completely consistant." Also, in any action where petitioners seeks reversal solely because of the exclusion of evidence, it naturally follows that either the District Court or the Jury has found against petitioner on the basis of the evidence actually admitted. Thus respondents are in effect

claiming that the exclusion of evidence prior to the commencement of petitioner's damage period cannot be prejudicial error. This contention is clearly without merit. See *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 790, 797. *Bausch Machine Tool Co.* v. *Aluminum Co. of America*, 72 F. 2d.(C.A. 2), 1934 cert. den., 293 U.S. 589.

For the reasons stated in this reply brief and in the petition for certiorari, therefore, we urge that this Court issue its writ of certiorari in order to review the judgment below.

Respectfully submitted,

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